B. Element missing from complaint

St v Petrone
161 Wis. 2d 530 (1991)

1) Scienter not alleged

   a. Citing number of correct substantive statute defining crime sufficient, so long as Def not prejudiced or misled by omission

St v Flakes
140 Wis. 2d 411
(Ct. App. 1987)

§ 971.29(2)

2) Typographical errors—amendment to conform to proof

   a. Amendment to conform to proof may be allowed when not prejudicial to Def

   b. If Def can understand charge from complaint sufficiently to prepare defense, amendment to correct mistaken statutory citation permissible

C. Repeater allegation and penalty enhancer

§ 973.12(1)
St v Gerard
189 Wis. 2d 505 (1995)
St v Williams
186 Wis. 2d 506
(Ct. App. 1994)
rev'd,
198 Wis. 2d 479 (1996)
St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)

1) Repeater allegations and penalty enhancer must be alleged in charging document to which Def pleads. Penalty enhancer must be supported by probable cause

St v Koeppen
195 Wis. 2d 117
(Ct. App. 1995)

   a. Repeater: State proves at sentencing

St v Williams
190 Wis. 2d 1
(Ct. App. 1994)
rev'd on other grounds
198 Wis. 2d 516 (1996)

   b. Enhancer: State proves as an element of the crime at trial

St v Squires
211 Wis. 2d 876
(Ct. App. 1997)

2) Charging document alleging repeater when predicate crime(s) occurred more than five years before new offense, need not allege period of incarceration

Mikrut v St
212 Wis. 2d 859
(Ct. App. 1997)

3) For purposes of repeater law, prior conviction is measured from date judgment of conviction entered, not date Def merely found guilty

§ 973.12(1)
St v Martin
162 Wis. 2d 883 (1991)

St v Gerard
189 Wis. 2d 505 (1995)

St v Campbell
201 Wis. 2d 783
(Ct. App. 1996)

St v Larsen
177 Wis. 2d 835
(Ct. App. 1993)

§ 939.62(1)

§ 939.12

St v Carpenter
179 Wis. 2d 838
(Ct. App. 1993)

4) Charging document may not be amended to add repeater allegation after arraignment and entry of plea, except

   a. May be amended post-plea to correct clerical error in sentence portion of penalty enhancement if Def is not prejudiced

   b. If original information alleges repeater status, information may be amended post-arraignment if sufficiency of notice to Def of his/her repeater status is unaffected

5) Ct may grant State's post-plea motion to dismiss without prejudice to recharge with repeater allegation

6) Applies to present conviction for any crime

   a. "Crime" is prohibited conduct punishable by fine and/or imprisonment

   b. Does not apply to punitive contempt

D. Multiplicity—Single offense charged in multiple counts—Two-prong test (*See* Sec. 5, *infra*)

St v Seymour
183 Wis. 2d 683 (1994)

E. Duplicity—Charging several distinct and separate offenses in a single count

St v Johnson
2001 WI 52
243 Wis. 2d 365
St v Elverman
2015 WI App 91
366 Wis. 2d 169
St v Chambers
173 Wis. 2d 237
(Ct. App. 1992)

1) EXCEPT as limited by prohibition against duplicity, State has discretion to charge Def who has engaged in a series of offenses that may be properly viewed as one continuing offense with

   a. One continuous offense

   b. A single offense

   c. Series of single offenses

2) Duplicitous charges violate due process under 6th and 14th Amendments of US Constitution and article I, §§ 7 and 8, of Wis Constitution

3) Complaint duplicitous only if any of following dangers present and cannot be cured by jury instructions

a. Def may not be properly notified of charges

b. Def may be subjected to double jeopardy

c. Def may be prejudiced by evidentiary rulings at trial

d. Def may be deprived of right to unanimous jury verdict

St v Koeppen
2000 WI App 121
237 Wis. 2d 418
St v Hammer
216 Wis. 2d 214, 219
(Ct. App. 1997)

- Def entitled to unanimity with respect to ultimate issue of guilt or innocence, but unanimity not always required with respect to alternative ways in which crime can be committed

Jackson v St
92 Wis. 2d 1
(Ct. App. 1979)

- When alternative acts are charged in the disjunctive, so that each act is an independent offense, complaint is duplicitous because jury may not agree unanimously as to which alternative act(s) Def committed

Jackson v St
92 Wis. 2d 1
(Ct. App. 1979)
see also St v Seymour
183 Wis. 2d 683 (1994)

— EXAMPLE: The alternatives in the theft statute, § 943.20(1) (took and carried away, used, transferred, etc.), are independent offenses; they are not synonyms defining the single offense of theft

- Disjunctive pleading of alternative, practically indistinguishable acts defining a single crime is not duplicitous

Manson v St
101 Wis. 2d 413 (1981)

— EXAMPLE: The robbery statute, § 943.32(1), creates a single crime with two practically indistinguishable statutorily prohibited ways of being committed (use of force and threat of imminent use of force)

§ 948.01(6)
St v Lomagro
113 Wis. 2d 582 (1983)
St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

— EXAMPLE: The single "act" of sexual intercourse may be committed in several different ways in one continuous transaction

St v Seymour
183 Wis. 2d 683 (1994)

- Acts charged in conjunctive not duplicitous (but may be multiplicitous: *See* **Sec. 5** below)

St v Jacobsen
2014 WI App 13
352 Wis. 2d 409
St v Miller
2002 WI App 197
257 Wis. 2d 124

4) Determine single, continuous criminal transaction versus multiple discrete crimes by considering

a. Whether the multiple acts are "conceptually similar"

b. Time factors

- Occurred substantially same time
- One continuous transaction

c. Identity of actor(s) and victim(s)

St v Hammer
216 Wis. 2d 214, 219
(Ct. App. 1997)

d. "Does statute create only one offense with multiple modes of commission or does statute create multiple offenses defined by each distinct felony Def intended to commit?"

- Consider legislative intent using language of statute, legislative history, nature of proscribed conduct, and appropriateness of multiple punishments for conduct

St v Cleveland
2000 WI App 142
237 Wis. 2d 558

e. Were they separate volitional acts?

St v Lomagro
113 Wis. 2d 582 (1983)

5) If duplicitous, DA elects the act on which it relies or files separate counts

F. Vindictive Prosecution

US v Goodwin
102 S. Ct. 2485, 2488
(1982)

1) Due-process violation when the State retaliates against a person for exercising a statutory or constitutional right

St v Johnson
2000 WI 12
232 Wis. 2d 679

2) If Def establishes a realistic likelihood that vindictiveness exists, then a rebuttable presumption of prosecutorial vindictiveness applies

St v Cameron
2012 WI App 93, ¶ 13,
344 Wis. 2d 101

a. Filing of additional charges during the give-and-take of pretrial plea negotiations does not warrant a presumption of vindictiveness

Blackledge v Perry
94 S. Ct. 2098 (1974)

b. Presumption arises when prosecutor files more serious charges after Def appeals a conviction and wins a new trial

St v Johnson
2000 WI 12, ¶ 45,
232 Wis. 2d 679

3) If the presumption of vindictiveness is established, prosecutor may rebut with an explanation of objective circumstances that led to the additional charge

St v Johnson
2000 WI 12, ¶ 47,
232 Wis. 2d 679

4) If there is no presumption of vindictiveness, Def must establish actual prosecutorial vindictiveness

St v Cameron
2012 WI App 93, ¶ 14,
344 Wis. 2d 101

a. To establish actual vindictiveness, Def must show objective evidence that prosecutor acted to punish Def for standing on Def's legal rights

St v Williams
2004 WI App 56,
¶¶ 42–49,
270 Wis. 2d 761

b. No actual vindictiveness when prosecutor threatened Def with additional charges relating to separate incidents if Def insisted on trial on unrelated pending charges

G. Immunity from Prosecution in Overdose Cases

§ 961.443

1) An aider of someone who has overdosed or who the aider believes has overdosed under § 961.443(1) is immune from prosecution for possession of a controlled substance or a controlled substance analog under § 961.43(3g), drug paraphernalia under § 961.573, or a masking agent under § 961.69(2)

St v Williams
2016 WI App 82
372 Wis. 2d 365

2) Def has the burden to prove pretrial by a preponderance of the evidence entitlement to immunity

3) Once motion claiming immunity filed, Ct should make determination as to entitlement at its earliest opportunity. (Upon request, Ct should hold evidentiary hearing)

St v Lecker
2020 WI App 65
394 Wis. 2d 285

4) Immunity applies only if charge occurs under circumstances surrounding or leading to "rendering of aid"

5) Charges specified in § 961.443(2) must be dismissed

4. Motion to Dismiss Based on Critical Misstatements or Omissions in Complaint

Franks v Delaware
98 S. Ct. 2674 (1978)

St v Mann
123 Wis. 2d 375 (1985)

A. Preconditions to holding hearing on motion

1) Def must make offer of proof that

   a. Untrue facts included in complaint or qualified facts omitted

      - Misstatements or omissions must be identified

   b. Because of misstatement or omission, complaint inadequate for probable cause

B. Standard of proof at hearing

1) Burden of proof on Def

2) Must show existence of misstatements or omitted facts by preponderance of evidence

C. No hearing required if

1) Probable cause exists if misstatements excised or omissions included

2) Omitted facts not critical, determinative, or undisputed facts with only single meaning

5. Double Jeopardy

St v Davison
2003 WI 89
263 Wis. 2d 145

A. Wis Supreme Ct accepts decisions of U.S. Supreme Ct as controlling interpretations of Double Jeopardy provisions of both U.S. and Wis Constitutions

City of Oshkosh v Winkler
206 Wis. 2d 538
(Ct. App. 1996)

B. Def must establish double jeopardy violation beyond a reasonable doubt

C. Jeopardy attaches when:

§ 972.07(2)

1) Jury is empaneled and sworn

§ 972.07(1)

2) In Ct trial, when first witness is sworn

St v Comstock
168 Wis. 2d 915 (1992)

3) When Ct accepts plea

St v Henning
2004 WI 89
273 Wis. 2d 352

D. Double Jeopardy Clause protects against

1) Multiple punishments for same offense. *See* **Sec. 5.E.**, *infra*

St v Carpenter
197 Wis. 2d 252 (1995)
St v Stephens
201 Wis. 2d 82
(Ct. App. 1996)

a. Determination whether sanction is punishment under Double Jeopardy Clause rests on purpose actually served by statute, not underlying nature of proceeding giving rise to sanction

- When principal purpose is nonpunitive, action does not violate double jeopardy if punishment, retribution or deterrence are also present

City of Oshkosh v Winkler
206 Wis. 2d 538
(Ct. App. 1996)

- If principal purpose of regulation is punishment, retribution or deterrence, then that regulation is a sanction triggering double jeopardy protection

St v McMaster
206 Wis. 2d 30 (1996)

- No double jeopardy violation if civil sanction's principal purpose is remedial

St v Konrath
218 Wis. 2d 290 (1998)

- Civil vehicle forfeiture not double jeopardy

St v Robinson
2014 WI 35
354 Wis. 2d 351
St v Willett
2000 WI App 212
238 Wis. 2d 621

- Sentence modification/resentencing may constitute double jeopardy. See **CR 39**

St v Terry
2000 WI App 250
239 Wis. 2d 519

- Probation/parole revocation proceedings do not implicate double jeopardy

St v Gramza
2020 WI App 81,
¶¶ 27–29,
395 Wis. 2d 215

- Mandatory minimum sentence does not violate double jeopardy after completion of Substance Abuse Program (SAP)

2) Multiple prosecutions—after acquittal or conviction. *See* **Sec. 5.F.**, *infra*

St v Vassos
218 Wis. 2d 330 (1998)
St v Guzman
2001 WI App 54
241 Wis. 2d 310

a. Ct should also conduct collateral estoppel (issue preclusion) analysis established in *Ashe v Swenson*, 90 S. Ct. 1189 (1970)

E. Multiplicity—Single offense charged in multiple counts—Two-prong test

St v Steinhardt
2017 WI 62, ¶ 14
375 Wis. 2d 712
St v Pal
2017 WI 44, ¶ 15
374 Wis. 2d 759

§ 939.66
St v Davison
2003 WI 89
263 Wis. 2d 145

1) First test—Multiplicitous if offenses charged are "identical in law and fact"

Blockburger v US
52 S. Ct. 180 (1932)
St v Dauer
174 Wis. 2d 418
(Ct. App. 1993)
St v Johnson
178 Wis. 2d 42
(Ct. App. 1993)

a. "Identical in law" (*Blockburger* "elements only") test

St v Anderson
219 Wis. 2d 739 (1998)
St v Vassos
218 Wis. 2d 330 (1998)
St v Dowe
197 Wis. 2d 848
(Ct. App. 1995)
rev'd on other grounds
207 Wis. 2d 129 (1997)

- Elements only test: Analysis involves side-by-side comparison of statutes, not facts of Def's activity. Does each offense require proof of an additional element/fact that the other does not?

St v Wise
2021 WI App 87
400 Wis. 2d 174

- Not multiplicitous when same act causes separate harm that is an element of offense
- To be lesser included, must be "utterly impossible" to commit the greater crime without committing the lesser
- Test applies to charges under same statute and to multiple charges under different sections

St v Warren
229 Wis. 2d 172
(Ct. App. 1999)
St v Davis
171 Wis. 2d 711
(Ct. App. 1992)
St v Kanarowski
170 Wis. 2d 504, 509
(Ct. App. 1992)

b. "Identical in fact" means proof of identical facts

St v Steinhardt
2017 WI 62, ¶ 23
375 Wis. 2d 712

- Similar facts relating to same legal element are not multiplicitous, if acts either separate in time or of significantly different nature in fact

St v Ziegler
2012 WI 73
342 Wis. 2d 256
St v Multaler
2002 WI 35
252 Wis. 2d 54

- A "time for reflection" or a "separate volitional act" is often significant, especially in sexual assault and possession of child pornography cases

St v Eaglefeathers
2009 WI App 2, ¶ 8
316 Wis. 2d 152

- "Identical in fact" depends upon whether one count requires proof of an additional fact that the other does not

St v Schultz
2020 WI 24
390 Wis. 2d 570

- Resolve ambiguous charging language in second pleading with reasonable person's understanding of allegations, considering the entire record

St v Pal
2017 WI 44, ¶ 27
374 Wis. 2d 759
St v Hartnek
146 Wis. 2d 188
(Ct. App. 1988)
Harrell v St
88 Wis. 2d 546
(Ct. App. 1979)

- When offense in question against persons rather than property, there are as many offenses as individuals affected

St v Davison
2003 WI 89
263 Wis. 2d 145
St v Beasley
2004 WI App 42, ¶ 7,
271 Wis. 2d 469

c. If offenses identical in law and fact, then presumption that legislature did not intend to punish same offense twice, absent clear indication of contrary legislative intent

St v Sauceda
168 Wis. 2d 486 (1992)
St v Beasley
2004 WI App 42, ¶ 7,
271 Wis. 2d 469

d. If offense different in law and fact, presumption that legislature intended to permit cumulative punishments, unless rebutted by clear legislative intent to the contrary

St v Jackson
2004 WI App 190,
276 Wis. 2d 697

e. Legislature intended to permit multiple punishments when conspirators agree to commit multiple crimes

St v Steinhardt
2017 WI 62, ¶ 14
375 Wis. 2d 712
St v Pal
2017 WI 44, ¶ 15
374 Wis. 2d 759
St v Davison
2003 WI 89, ¶¶ 43, 50
263 Wis. 2d 145
St v Kuntz
160 Wis. 2d 722,
756–57 (1991)

2) Second test: If presumption arises that legislature intended to permit multiple punishments, Ct must then determine whether there are other factors that **clearly indicate** contrary legislative intent, i.e., that "allowable unit of prosecution" for offense is to be only a single count

St v Patterson
2010 WI 130
329 Wis. 2d 599

a. Def has burden of overcoming presumption by proving contrary legislative intent

St v Davison
2003 WI 89
263 Wis. 2d 145
St v Multaler
2002 WI 35
252 Wis. 2d 54
St v Anderson
219 Wis. 2d 739 (1998)

b. Four factors Ct uses to assess legislative intent

- Statutory language

  — See also if § 939.66 applies, precluding convictions of both greater offense and enumerated included crime(s)

- Legislative history and context

- Nature of proscribed conduct

- Appropriateness of multiple punishments for conduct

St v Trawitzki
2000 WI App 205
238 Wis. 2d 795, *aff'd*
2001 WI 77
244 Wis. 2d 523

St v Sauceda
168 Wis. 2d 486 (1992)

St v Eastman
185 Wis. 2d 405
(Ct. App. 1994)

— Single act or course of conduct?

— Are two grounds different enough to merit separate punishment?

— Were statutes meant to protect different interests of victim or public?

F. Multiple Prosecutions

St v Henning
2004 WI 89
273 Wis. 2d 352
St v Vassos
218 Wis. 2d 330 (1998)

1) Double Jeopardy Clause protects against

Blockburger v US
52 S. Ct. 180 (1932)

a. Prosecution of same offense after acquittal

- Apply *Blockburger* "same elements" test
- Issue preclusion (formerly known as collateral estoppel) (*See* **Sec. 5.G.** below). Analyze only if there is no violation of double jeopardy

b. Prosecution of same offense after conviction

c. Prosecution of same offense after declaration of mistrial under certain circumstances. *See* **CR 35** (Mistrial)

§ 939.71, § 961.45
US v Dixon
113 S. Ct. 2849 (1993)
St v Triebold
2021 WI App 13,
¶¶ 23–26,
396 Wis. 2d 176
St v Jacobs
186 Wis. 2d 219
(Ct. App. 1994)

2) Test: Does each offense contain an element not contained in the other? That is, does each crime require proof of a fact which the other does not?

a. If not, they are same offense and subsequent prosecution barred

- "Same elements" or *Blockburger* test applies

St v McKee
2002 WI App 148, ¶ 17,
256 Wis. 2d 547

b. If so, then necessary facts exception may apply

§ 938.39

3) Double jeopardy to criminally prosecute same matter previously adjudicated in Juv Ct

St v Everett
231 Wis. 2d 616
(Ct. App. 1999)
Craig SG v St
209 Wis. 2d 65
(Ct. App. 1997)

a. However, not double jeopardy to prosecute for same offense for which Juv Ct or institution imposed sanctions

St v Lawton
167 Wis. 2d 461
(Ct. App. 1992)

4) Double Jeopardy Clause of 5th Amendment no bar to felony prosecution when Def previously convicted of civil municipal traffic charge arising from same incident

   a. Proceeding to enforce municipal ordinance is civil

   b. Double Jeopardy Clause not implicated when one of two successive prosecutions is civil

US v Felix
112 S. Ct. 1377 (1992)

5) Prohibition for other acts generally does not implicate double jeopardy

St v James
169 Wis. 2d 490, 495–97
(Ct. App. 1992)

6) Use of prior felony conviction to prove both an element of current offense (e.g., felon possessing firearm) and repeater status does not violate double jeopardy prohibition

Currier v Virginia
138 S. Ct. 2144 (2018)

7) Double jeopardy does not preclude second trial when Def consents to have charges severed, even if Def was acquitted on a fact that is necessary to prosecution in second trial

St v Fonder
162 Wis. 2d 591
(Ct. App. 1991)
Garrity v Fiedler
850 F. Supp. 777
(E.D. Wis.), *aff'd*, 41 F3d
1150 (7th Cir 1994)

8) Criminal prosecution arising from same conduct that led to imposition of disciplinary measures by prison authorities does not violate double jeopardy prohibition

Witte v US
115 S. Ct. 2199 (1995)

9) Double Jeopardy Clause does not prevent subsequent prosecution or punishment for criminal activity that had been considered as a factor at sentencing for a different crime

US v Dixon
113 S. Ct. 2849 (1993)

10) Double jeopardy protection applies to punitive contempt proceedings

St v McMaster
206 Wis. 2d 30 (1996)

11) Sec. 343.305 administrative suspension is remedial civil sanction and not punishment for double jeopardy purposes

St v Konrath
218 Wis. 2d 290 (1998)

12) Civil motor vehicle forfeiture does not invoke double jeopardy

St v Terry
2000 WI App 250
239 Wis. 2d 519

13) Probation/parole revocation proceedings not dispositive

Smith v Massachusetts
125 S. Ct. 1129 (2005)

14) If Ct grants a motion for directed verdict at close of State's case, Ct cannot reverse decision and allow charge to go to jury without exposing Def to double jeopardy

15) See Chapter on **Mistrial, CR 35**

Ashe v Swenson
90 S. Ct. 1189 (1970)
St v Holland
87 Wis. 2d 567, 582
(Ct. App. 1979)
rev'd on other grounds
91 Wis. 2d 134 (1979)
St v Wille
185 Wis. 2d 673
(Ct. App. 1994)

G. Issue preclusion (formerly known as collateral estoppel)

St v Guzman
2001 WI App 54
241 Wis. 2d 310
St v Landrum
191 Wis. 2d 107
(Ct. App. 1995)

1) Double jeopardy prevents State from retrying in a subsequent prosecution any ultimate fact that was resolved in favor of Def at an earlier trial (or hearing if burden of proof or persuasion was same or greater)

St v Kasian
207 Wis. 2d 611
(Ct. App. 1996)

2) Factors that may bear on question of whether issue preclusion applies

   a. Could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment?

   b. Is the question one of law that involves two distinct claims or intervening contextual shifts in the law?

   c. Do significant differences in the quality or extensiveness of proceedings between the two Cts warrant relitigation of the issues?

   d. Have the burdens of persuasion shifted such that the parties seeking preclusion had a lower burden of persuasion in the first trial than in the second?

e. Are matters of public policy and individual circumstances involved that would render application of issue preclusion fundamentally unfair?

- Inadequate opportunity or incentive to obtain full and fair adjudication in the initial action

f. Two additional factors in assessing whether issue preclusion applies when prior proceeding is before administrative agency

- Whether agency was adjudicating a disputed fact issue properly before it
- Whether agency's proceedings provided parties adequate opportunity to litigate

3) If issue preclusion applies

a. Test: Ct reviews entire relevant record of prior proceeding to determine whether rational jury could have grounded its verdict upon an issue other than that Def claims was previously decided against State

b. Ct need not determine precise issue upon which acquittal rested unless process of elimination leads it finally to issue sought to be foreclosed from retrial

St v Vassos
218 Wis. 2d 330, 343
(1998)

c. Def has burden to demonstrate that issue in question was decided in first proceeding

Schiro v Farley
114 S. Ct. 783 (1994)
US v Gentile
816 F2d 1157, 1162
(7th Cir 1987)
St v Holland
87 Wis. 2d 567
(Ct. App. 1979)
rev'd on other grounds
91 Wis. 2d 134 (1979)

d. Cases suggest Def's burden is high—Ct to be able to determine with assurance that fact in issue was necessarily established by the earlier judgment

4) Double jeopardy is personal right

a. Cannot be in double jeopardy unless earlier placed in jeopardy

b. Therefore, Def cannot rely on accomplice's favorable issue resolution at his/her separate trial

St v West
181 Wis. 2d 792
(Ct. App. 1993)

H. Dual sovereignty doctrine permits one act that violates the laws of two states to be punished in both states

St v Hansen
2001 WI 53
243 Wis. 2d 328

1) Sec. 961.45 bars such prosecution in Wis for controlled substances violation when previous acquittal or conviction under law of another state

St v Bautista
2009 WI App 100
320 Wis. 2d 582

2) Sec. 961.45 does not bar prosecution for conspiracy in one jurisdiction and delivery in another if the acts involve different conduct

CR 16
SPEEDY TRIAL

1. Constitutional Protection ..... CR 16-3
2. Statutory Protection ..... CR 16-5
3. Interstate Detainers ..... CR 16-6

1. Constitutional Protection

US Const amend VI

A. Federal authority

1) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..."

Wis Const art I, § 7

B. State authority

1) "In all criminal prosecutions the accused shall enjoy the right ... to a speedy public trial..."

US v MacDonald
102 SCt 1497 (1982)
St v Lemay
155 Wis. 2d 202 (1990)

C. Speedy trial concern attaches at time of arrest or when Def officially accused of crime, whichever occurs first

1) Earlier, pre-accusation, investigatory period governed by due process and statutes of limitation rather than speedy trial rights

St v Wilson
149 Wis. 2d 878 (1989)
St v Blanck
2001 WI App 288
249 Wis. 2d 364

a. To establish due-process violation, must show Def suffered actual prejudice and that delay due to improper motive

St v Urdahl
2005 WI App 191
286 Wis. 2d 476

2) If charges are dismissed and then filed again, speedy trial clock does not begin ticking until second filing, as long as Def is not under arrest or under any bail conditions

St v Allen
179 Wis. 2d 67
(Ct. App. 1993)

3) Includes right to speedy sentencing

Barker v Wingo
92 SCt 2182 (1972)
cited in St v Lemay
155 Wis. 2d 202 (1990)

D. Determination of deprivation

1) To determine whether constitutional right to speedy trial has been denied, Ct must balance 4 factors

St v Urdahl
2005 WI App 191
286 Wis. 2d 476

a. Length of delay

Doggett v US
112 SCt 2686 (1992)
St v Borhegyi
222 Wis. 2d 506, 510
(Ct. App. 1998)

- Post-accusation delay that approaches 12 months is presumptively prejudicial

Doggett v US
112 SCt 2686 (1992)
St v Borhegyi
222 Wis. 2d 506, 510
(Ct. App. 1998)

- Necessary to inquire into 3 other factors only when delay is presumptively prejudicial

St v Leighton
2000 WI App 156
237 Wis. 2d 709

St v Williams
2004 WI App 56, ¶ 41
270 Wis. 2d 761

b. Reason for delay

- Def's request for or consent to adjournments may account for so much of alleged delay that Def cannot claim prejudice and Ct need not examine other factors

Vermont v Brillon
129 SCt 1283 (2009)

- Delays sought by or caused by appointed counsel are attributed to Def
  - "Systemic breakdown" exception: If delay results from systemic breakdown (problems that are both institutional in origin and debilitating in scope) in public defender system, such delay may be attributed to State

St v Provost
2020 WI App 21,
¶¶ 39–40,
392 Wis. 2d 262
pet for rev denied

St v Lock
2013 WI App 80
348 Wis. 2d 334

- Delay caused by refusal of federal authorities to produce Def in state Ct for trial is neutral

c. Def's assertion of right, and

d. Prejudice to Def

Day v St
61 Wis. 2d 236 (1973)

- Fourth consideration in ad hoc determination (prejudice to Def) requires inquiry into 3 interests of Def
  - Whether there has been pretrial incarceration
  - Whether Def suffered anxiety or concern during the elapsed time, and
  - Whether possibility that defense will be impaired was limited

St v Lemay
155 Wis. 2d 202 (1990)

2) Because evidence of prejudice speculative until after trial, "a *pretrial* determination that speedy trial rights have been violated can only be made when the evidence shows extraordinary circumstances justifying dismissal with prejudice"

US v MacDonald
98 SCt 1547 (1978)

3) Pretrial determination of speedy trial violation cannot be made, because the merits of speedy trial claims are intertwined with the merits of the case-in-chief, and a pretrial determination would be premature, absent a showing of extraordinary circumstances

Recommendation

4) Absent a showing of extraordinary circumstances, proceeding with trial will not compound any deprivation suffered and a determination of speedy trial violation may properly be made after trial

Barker v Wingo
92 SCt 2182 (1972)
St v Borhegyi
222 Wis. 2d 506
(Ct. App. 1998)

E. Remedy for violation of constitutional right to speedy trial: Charges are dismissed

2. Statutory Protection

A. Misdemeanor

971.10(1)

1) Within 60 days after initial appearance

B. Felony

971.10(2)(a)

1) Within 90 days from date trial demanded by a party in writing or on record

971.10(2)(a)

a. If demand in writing, copy must be served upon opposing party

971.10(2)(a)
St v Adams
207 Wis. 2d 568
(Ct. App. 1996)

b. Demand cannot be made until after filing of information or indictment

971.10(2)(b), 751.03

2) If Ct unable to schedule within 90 days, Ct must request assignment of another Judge

St ex rel Rabe v Ferris
97 Wis. 2d 63 (1980)

3) Stay of proceedings directed to lower Ct tolls running of time period for speedy trial

C. Continuance

971.10(3)(a)

1) Ct can order continuance on own motion or motion of any party, only if

971.10(3)(a)
St ex rel Rabe v Ferris
97 Wis. 2d 63 (1980)

a. Justice served by granting continuance would outweigh interest of public and Def in speedy trial, *and*

971.10(3)(a)

b. Ct sets forth oral or written reasons that granting continuance would serve greater justice than granting speedy trial

971.10(3)(b)

2) Factors Ct must consider when determining whether to grant continuance include

971.10(3)(b)1.

a. Whether failure to grant would likely make continuation of proceeding impossible or result in miscarriage of justice, or

971.10(3)(b)2.

b. Whether case as a whole is so unusual and complex it is unreasonable to expect adequate preparation within required time frames

971.10(3)(b)3.

c. Interests of victim(s)

971.10(3)(c)

3) Ct may not grant continuance because of calendar congestion, lack of diligent preparation, or State's failure to obtain witnesses

D. Waiver

Hatcher v St
83 Wis. 2d 559 (1978)

1) Guilty plea waives any objections grounded on right to speedy trial

St v Miller
2003 WI App 74
261 Wis. 2d 866

2) Speedy trial may be waived by Def discharging lawyer shortly before trial

E. Remedy for violation of statutory right to speedy trial

971.10(4)

1) Release from custody but not from obligations of bond pending trial

2) Violation does not authorize dismissal nor reversal of conviction after trial

3. Interstate Detainers

A. Created by detainer statutes. *See* CR 44

CR 17
PERSONAL JURISDICTION/ PLACE OF TRIAL

PERSONAL JURISDICTION ..... CR 17-3

1. Personal Jurisdiction Depends on Physical Presence Before Court ..... CR 17-3

2. Challenge to Personal Jurisdiction of Court ..... CR 17-5

PLACE OF TRIAL ..... CR 17-6

1. Venue ..... CR 17-6

2. Change of Place of Trial ..... CR 17-7

3. Factors to Be Considered by Court When Motion for Change of Place of Trial Made ..... CR 17-9

4. Consequences of Granting Motion ..... CR 17-11

5. Renewing Motion for Change of Place of Trial ..... CR 17-12

PERSONAL JURISDICTION

Walberg v St
73 Wis. 2d 448,
458 (1976)

1. Personal Jurisdiction Depends on Physical Presence Before Court

St v Monje
109 Wis. 2d 138,
144–45 (1982)
Walberg v St
73 Wis. 2d 448,
458 (1976)
St v Washington
120 Wis. 2d 654
(Ct. App. 1984)
aff'd
134 Wis. 2d 108 (1986)

A. Physical presence pursuant to

1) Properly issued warrant or summons based on probable cause, or

2) Lawful arrest, based on probable cause, or

3) Voluntary appearance

St v Waldoch
121 Wis. 2d 476 (1984)

a. In response to summons

St v Smith
131 Wis. 2d 220 (1986)
St ex rel Zdanczewicz v Snyder
131 Wis. 2d 147 (1986)
St v Monje
109 Wis. 2d 138,
146–47 (1982)

B. However, unlawful arrest does not deprive Trial Ct of personal jurisdiction

Cty of Riverside v McLaughlin
111 SCt 1661 (1991)
St v Golden
185 Wis. 2d 763
(Ct. App. 1994)

1) Unlawful *Riverside* detention does not affect jurisdiction

St v Moats
156 Wis. 2d 74 (1990)
St v Smith
131 Wis. 2d 220 (1986)

C. Essential element of personal jurisdiction is sufficiency of complaint, not validity of arrest

DWB v St
(In Int of DWB)
152 Wis. 2d 395
(Ct. App. 1989)
aff'd
158 Wis. 2d 398 (1990)

D. Purposes served by personal jurisdiction

1) To give notice to person that an action has been commenced, and

2) To confer authority of Ct over the person

E. If initial appearance conducted on record by telephone or live audiovisual means, Def may waive physical appearance

1) Without waiver, all grounds for challenging Ct's personal jurisdiction survive

2) Waiver must be on record

971.19

F. Fact that crime committed outside Wis is fatal to personal jurisdiction of Ct

St v Brown
2003 WI App 34
260 Wis. 2d 125

1) May be fact issue for jury

St v Stefanovic
215 Wis. 2d 310
(Ct. App. 1997)

G. Ct has no jurisdiction after a proper discharge from probation even if not all Ct-ordered conditions have been fulfilled

H. See Issuing Warrants/Subpoenas, CR 6, this volume, for discussion of probable cause to arrest

2. Challenge to Personal Jurisdiction of Court

A. Objection must be preserved

B. Entry of plea without reserving objection waives following attacks on personal jurisdiction

1) Sufficiency of complaint in misdemeanor action

Wold v St
57 Wis. 2d 344 (1973)

2) Sufficiency of prelim

Logan v St
43 Wis. 2d 128 (1969)

3) Holding prelim beyond statutory time limits

St v Russo
70 Wis. 2d 169 (1975)

4) Sufficiency of information, unless information fails to charge a crime known to law

a. Ct then lacks subject-matter jurisdiction

St v Webb
160 Wis. 2d 622 (1991)

5) Post-trial or post-plea discovered defects in prelim are not fatal to personal jurisdiction

Armstrong v St
55 Wis. 2d 282 (1972)

C. Felonies

1) Objections to personal jurisdiction made before prelim must be reasserted at arraignment or be deemed waived

St v Bonds
161 Wis. 2d 605
(Ct. App.)
rev'd on other grounds
165 Wis. 2d 27 (1991)

2) Guilty plea waives defects in complaint or in prelim bindover

St v Robles
157 Wis. 2d 55
(Ct. App. 1990)
aff'd
162 Wis. 2d 883 (1991)

D. Def waives right to claim loss of personal jurisdiction if Def selects course of action that causes defects in jurisdiction

1) When Ct approved request for co-signed bond, which was never signed, and prelim not commenced within 10 days after initial appearance, Def could not challenge jurisdiction of Ct

St v Horton
151 Wis. 2d 250
(Ct. App. 1989)

E. Statutory time limits for commencement of prelim do not apply or affect jurisdiction of Ct after remittitur from interlocutory appeal

PLACE OF TRIAL

1. Venue

A. Venue, generally

971.19(1)
St v Anderson
2005 WI 54
280 Wis. 2d 104

1) Criminal actions shall be tried in Cty where offense committed

St v Anderson
2005 WI 54, ¶ 22 n.5
280 Wis. 2d 104

2) State must prove venue beyond a reasonable doubt

971.19(2)
St v Elverman
2015 WI App 91, ¶ 38
366 Wis. 2d 169

3) If continuous offense alleged, venue is appropriate in any Cty in which one of the alleged acts occurred

St v Mendoza
80 Wis. 2d 122,
145 (1977)
Wis JI—Cr 267

4) In all criminal prosecutions, Def entitled to have case tried in Cty where offense committed

5) Exceptions

971.19

a. When criminal offense relates to more than one Cty and constitutes special factual situation within § 971.19

971.22

b. When Def successfully moves for change of venue under § 971.22

971.19(8)

c. Charge of interference with custody of a child may be tried in Cty where crime committed or Cty of lawful residence of child

971.19(12)
St v Jensen
2010 WI 38
324 Wis. 2d 586

d. Charge of certain election and campaign violations in Cty where Def resides

971.22(1)
Sheppard v Maxwell
86 SCt 1507 (1966)
McKissick v St
49 Wis. 2d 537 (1971)

B. Def has constitutional and statutory right to change of venue when community prejudice will make fair trial impossible

St v Bangert
131 Wis. 2d 246 (1986)

1) Venue not a question of personal or subject-matter jurisdiction

RMC Form GF-120

2. Change of Place of Trial

St v Hereford
224 Wis. 2d 605
(Ct. App. 1999)

A. Decision to move to change place of trial is tactical decision under control of defense counsel

B. Timeliness

971.22(1)

1) Motion must be made at arraignment, except

971.22(1)

2) Motion may be made after arraignment for cause

C. Form and contents

971.22(2)

1) Must be in writing

971.22(2)

2) Must be supported by affidavit, stating

971.22(2)

a. Evidentiary facts showing nature of prejudice alleged

St ex rel Hussong v Froelich
62 Wis. 2d 577, 593 (1974)

b. More than vague allegations of improper and prejudicial pretrial publicity

971.22(2)

3) State may file counter-affidavits

D. Def's burden of proof

Sheppard v Maxwell
86 SCt 1507 (1966)
Rideau v Louisiana
83 SCt 1417 (1963)
Tucker v St
56 Wis. 2d 728 (1973)

1) Def must establish reasonable likelihood that community prejudice will make fair trial impossible

a. Def must present more than vague allegations of improper and prejudicial pretrial publicity

St v Kramer
45 Wis. 2d 20 (1969)

b. Def must present evidence of community sentiment against Def

St ex rel Hussong v Froelich
62 Wis. 2d 577, 593 (1974)

c. Def need not prove actual prejudice

Briggs v St
76 Wis. 2d 313 (1977)

2) When reasonable likelihood that fair trial cannot be had, doubt should be resolved in favor of Def

E. Test for granting motion

Holland v St
87 Wis. 2d 567 (1979)

1) Motion addressed to sound discretion of Ct

Thomas v St
53 Wis. 2d 483 (1972)

a. Discretion guided by constitutional requirements that Def entitled to fair trial

971.22(3)
Sheppard v Maxwell
86 SCt 1507 (1966)
Tucker v St
56 Wis. 2d 728, 733 (1973)

2) Ct must grant motion when reasonable likelihood that community prejudice will make fair trial impossible

St v Ritchie
2000 WI App 136
237 Wis. 2d 664

3. Factors to Be Considered by Court When Motion for Change of Place of Trial Made

St v Hebard
50 Wis. 2d 408, 426 (1971)

A. Inflammatory nature of publicity

Briggs v St
76 Wis. 2d 313 (1977)

1) Objectionable news reports are those that attempt to influence public opinion against Def

Hoppe v St
74 Wis. 2d 107 (1976)

2) Objective information and non-editorial reporting not objectionable

Turner v St
76 Wis. 2d 1 (1977)

3) Reflective, noninflammatory editorials not objectionable

St v Pheil
152 Wis. 2d 523
(Ct. App. 1989)

B. Degree to which adverse publicity permeated area from which jury panel would be drawn

St v Hebard
50 Wis. 2d 408, 426 (1971)

C. Jurors' familiarity with publicity

Irvin v Dowd
81 SCt 1639 (1961)
Tucker v St
56 Wis. 2d 728, 735 (1973)

1) Jurors need not be totally ignorant of facts and issues involved

Skilling v US
130 SCt 2896 (2010)
Thomas v St
53 Wis. 2d 483,
492 (1972)

2) Informed jury not necessarily a prejudiced jury

St v Hebard
50 Wis. 2d 408,
426 (1971)

D. Timing and specificity of publicity in relationship to time of trial

Tucker v St
56 Wis. 2d 728,
735 (1973)

1) Prejudicial effect of publicity wanes with passage of time

St v Hebard
50 Wis. 2d 408,
426 (1971)

E. Degree of State participation in dissemination of publicity

St v Hebard
50 Wis. 2d 408,
427–28 (1971)

F. Publication of inadmissible information

Holland v St
87 Wis. 2d 567
(Ct. App. 1979),
rev'd on other grounds,
91 Wis. 2d 134 (1979)

G. Severity of offense

St v Pheil
152 Wis. 2d 523
(Ct. App. 1989)

H. Degree of care exercised in voir dire by Def

1) Utilization of challenges available to Def, both peremptory and for cause

St v Hebard
50 Wis. 2d 408,
426 (1971)

I. Degree of care exercised and amount of difficulty in selecting jury

McKissick v St
49 Wis. 2d 537,
545 (1971)

J. Availability of less drastic remedies

St ex rel Hussong
v Froelich
62 Wis. 2d 577,
591 (1974)

1) Extensive voir dire

Sheppard v Maxwell
86 SCt 1507 (1966)

2) Continuance of trial

3) Sequestration of jury

971.22 Comment

K. Check district rules for practical considerations in changing place of trial

4. Consequences of Granting Motion

971.22(3)

A. Trial may be held in Cty where fair trial can be had

1) Trial Judge selects new Cty

Sanders v St 69 Wis. 2d 242 (1975)

2) Def cannot choose new Cty for trial

971.22(3)

3) Only one change of venue may be granted under § 971.22

971.225(1)

B. Or, jury selected from another Cty in lieu of change of venue, provided

971.225(1)(a)

1) Jurors will be sequestered

971.225(1)(b)

2) Grounds for change of venue exist

971.225(1)(c)

3) Cost to original Cty will be less than cost of holding trial in second Cty

C. If Ct elects to choose jury from another Cty

971.225(2)

1) After jury has been selected in second Cty, proceedings held in original Cty

971.225(2)

2) Original Cty must reimburse second Cty for costs under § 814.22

971.22(3)

D. Judge ordering change of venue must preside at trial

971.22(3)

E. Pretrial preliminary matters may be conducted in either Cty

1) Within discretion of Judge

971.22(3)

F. Judge must decide in which Cty Def to be held, if Def in custody

971.22(3)

G. Judge must decide in which Cty record to be kept

St v Bangert
131 Wis. 2d 246 (1986)

H. Once change of venue granted, Ct may change place of trial more than once

5. Renewing Motion for Change of Place of Trial

A. Def may reassert motion if reasonable probability of community prejudice has developed

St v Nutley
24 Wis. 2d 527,
566 (1964)

B. Another change of place of trial is required when fair trial cannot be had in second Cty

CR 18: MOTION FOR JOINDER (CONSOLIDATION) OR SEVERANCE

1. General Principles of Joinder and Severance Essentially the Same ..... CR 18-1
2. Joinder of Crimes ..... CR 18-3
3. Severance of Crimes ..... CR 18-5
4. Joinder of Defendants ..... CR 18-5
5. Severance of Defendants ..... CR 18-8
6. Trial Practice Option ..... CR 18-8

Jung v St
32 Wis. 2d 541, 545
(1966)

1. General Principles of Joinder and Severance Essentially the Same

St v Leach
124 Wis. 2d 648, 671
(1985)
St v Hall
103 Wis. 2d 125, 141
(1981)

A. Ct must balance potential prejudice of joinder with considerations of judicial administration

Jung v St
32 Wis. 2d 541, 546
(1966)
US v Echeles,
352 F2d 892, 896
(7th Cir 1965)

1) Right of Def to fair trial must be overriding consideration

Holmes v St
63 Wis. 2d 389 (1974)

2) Valid public interest exists to avoid duplications of time-consuming trials involving same factual situations

2. Joinder of Crimes

Francis v St
86 Wis. 2d 554, 558
(1979)
St v Hoffman
106 Wis. 2d 185, 208
(Ct. App. 1982)

A. Sec. 971.12(1) to be construed broadly in favor of initial joinder

B. Joinder at charging stage

1) More than one crime may be charged in same complaint or information, provided

§ 971.12(1)

a. Crimes charged of same or similar character

St v Davis
2006 WI App 23
289 Wis. 2d 398
St v Locke
177 Wis. 2d 590
(Ct. App. 1993)
St v Hamm
146 Wis. 2d 130
(Ct. App. 1988)

- Crimes must be same type of offenses occurring over relatively short period of time and evidence as to each must overlap

St v Holt
128 Wis. 2d 110, 118
(Ct. App. 1985)
St v Hoffman
106 Wis. 2d 185, 208
(Ct. App. 1982)

- Crimes not of same or similar character simply because same statutory violation

St v Hamm
146 Wis. 2d 130
(Ct. App. 1988)

- No per se rule on when time period between similar offenses so great they may not be joined

§ 971.12(1)
St v Bellows
218 Wis. 2d 614
(Ct. App. 1998)

b. Crimes charged based on same act or transaction

§ 971.12(1)
St v Salinas
2016 WI 44, ¶¶ 42–46
369 Wis. 2d 9

c. Crimes charged based on two or more acts or transactions that are connected together or constitute parts of common scheme or plan

Considerations include (but are not limited to):

- Closely related charges
- Common factors of substantial importance
- Whether one charge arose from another
- Whether crimes close in time and place or involved same victim(s)
- Similar manner, scheme, or plan
- Whether one crime committed to prevent punishment for another crime
- Whether joinder serves the goals of the statute

§ 971.12(1)

2) If misdemeanor joined with felony charge, case tried in Ct with jurisdiction to try felony charge

St v Leach
124 Wis. 2d 648, 671
(1985)

3) Misjoinder in some cases may be harmless error

C. Consolidation for trial

§ 971.12(4)

1) Ct may order two or more separate complaints or informations tried together, provided

   a. Crimes and Def(s) could have been joined in single complaint or information

   b. Standards permitting joinder at charging stage met

§ 971.12(4)

2) Trial procedure same as if prosecution under single complaint or information

3) Objections to consolidation

Jung v St
32 Wis. 2d 541, 547
(1966)

   a. Grounds for objection should be stated

   b. Objections should be supported by affidavits

3. Severance of Crimes

§ 971.12(3)
St v Holmes
63 Wis. 2d 389 (1974)
St v Bellows
218 Wis. 2d 614
(Ct. App. 1998)

A. If joinder proper under § 971.12, Def has burden of proving prejudice to Def in order to gain severance

§ 971.12(3)

1) Ct may order separate trials of counts, or

St v Bettinger
100 Wis. 2d 691 (1981)

   a. Ct to balance prejudice to Def against interest of public in conducting joint trial on multiple counts

St v Prescott
2012 WI App 136, ¶ 13,
345 Wis. 2d 313

   b. Prejudice must be substantial to rebut presumption of proper joinder

St v Wolske
143 Wis. 2d 175
(Ct. App. 1988)

   c. Ct can order severance to prevent confusion when charges similar or burden of proof confusing

St v Johnston
178 Wis. 2d 20
(Ct. App. 1993)
rev'd on other grounds
184 Wis. 2d 794 (1994)

   d. Ct can use jury instruction to inform of distinct burdens of proof

§ 971.12(3)

2) Ct may provide whatever relief justice requires

B. Prejudice to Def

Drew v US
331 F2d 85, 88
(DC Cir 1964)

1) Can result from jury hearing incriminating evidence not admissible in separate trials

St v Hall
103 Wis. 2d 125 (1981)

a. Unless evidence of each crime simple and distinct and confusion or cumulative effect minimal

b. Consider prophylactic instruction that evidence on one crime may not be used in determining guilt on other

St v Denny
120 Wis. 2d 614, 620
(Ct. App. 1984)

c. Tactics of counsel

Bailey v St
65 Wis. 2d 331, 346
(1974)
US v Quinn
365 F2d 256
(7th Cir 1966)

2) Can result from jury using evidence cumulatively

St v Locke
177 Wis. 2d 590
(Ct. App. 1993)

a. Consider bad acts evidence under § 904.04(2)

b. Evidence on any one charge might not persuade jury of Def's guilt, but sum of evidence may convince jury of guilt on all charges

Cross v US
335 F2d 987
(DC Cir 1964)

3) Can result from Def's inability to testify on one count without being cross-examined on count Def did not want to testify about

Holmes v St
63 Wis. 2d 389, 398
(1974)

a. Def must make convincing showing that Def has important testimony to offer regarding one count and strong need to refrain from testifying on other

St v Nelson
146 Wis. 2d 442
(Ct. App. 1988)

b. Def must present enough information to show claim of prejudice genuine and to enable Ct to weigh "economy and expedition of judicial administration" against Def's interest in having free choice to testify

St v Hamm
146 Wis. 2d 130
(Ct. App. 1988)

c. Supreme Ct has refused to adopt rule that severance mandatory whenever Def decides to selectively testify on some but not all properly joined charges

C. No prejudice to Def need be shown if charging document joins offenses that should not be joined under statute

D. Severance not required if:

Holmes v St
63 Wis. 2d 389, 397
(1974)

1) Charges "so inextricably intertwined ... as to make proof of one crime impossible without proof of the other"

St v Locke
177 Wis. 2d 590, 596–99
(Ct. App. 1993)

2) Evidence would be admissible as "other acts" if there were separate trials

St v Denny
120 Wis. 2d 614, 618
(Ct. App. 1984)

E. Standard for review is erroneous exercise of discretion by Trial Ct

Currier v Virginia
138 S. Ct. 2144 (2018)

F. If acquitted, Def who consented to severance cannot assert issue preclusion in second trial

4. Joinder of Defendants

§ 971.12(2)
St v King
120 Wis. 2d 285, 291
(Ct. App. 1984)

A. Two or more Defs may be charged in same complaint or information if alleged to have participated in same act or transaction or series of acts or transactions constituting one or more crimes

1) Defs may be charged in one or more counts

2) All Defs need not be charged in each count

St ex rel Nickl v Beilfuss
15 Wis. 2d 428 (1962)

B. Can be tried together in Ct's sound discretion, if alleged offenses arise out of same transaction provable by same evidence

5. Severance of Defendants

A. Mandatory severance

§ 971.12(3)
Samia v US
143 S. Ct. 2004 (2023)
Bruton v US
88 S. Ct. 1620 (1968)

1) When DA advises Ct before trial of intent to use statement of co-Def that implicates another Def in crime charged

Richardson v Marsh
107 S. Ct. 1702 (1987)
Pohl v St
96 Wis. 2d 290, 300–01
(1980)

a. Unless Ct orders deletion of portions of statement that implicate Def

Pohl v St
96 Wis. 2d 290, 301
(1980)

- Such deletions are permissible alternative to mandatory severance

Samia v US
143 S. Ct. 2004 (2023)
St v Mayhall
195 Wis. 2d 53
(Ct. App. 1995)

- If requested by nontestifying co-Def, Ct must give limiting jury instruction that confession may be used only against co-Def who made it

Pohl v St
96 Wis. 2d 290, 301
(1980)

- Such practice furthers expeditious Ct administration

St v Nieves
2017 WI 69, ¶ 2
376 Wis. 2d 300

b. If statement of co-Def is nontestimonial under *Crawford v. Washington* (e.g., statement to jail informant), then no mandatory severance under *Bruton*

St v Cartagena
40 Wis. 2d 213 (1968)

2) *Bruton* rule does not apply to accomplice's admission, when

a. Accomplice not co-Def, and

b. Accomplice takes stand as alibi witness and is cross-examined regarding admission

§ 971.12(3)

B. Discretionary severance

St v Nutley
24 Wis. 2d 527, 543
(1964)
Pollack v St
215 Wis. 200 (1934)

1) When there are antagonistic defenses

a. When defense of one Def, if successful, mandates conviction of other

Jung v St
32 Wis. 2d 541, 546
(1966)

b. Def should not be forced to meet attacks of both prosecutor and co-Def

Zafiro v US
113 S. Ct. 933 (1993)

c. Mutually antagonistic defenses not prejudicial per se

d. Severance should be granted if serious risk that joint trial would compromise specific trial right of one of Defs or prevent jury from making reliable judgment about guilt or innocence

e. Cts can use less drastic means, such as cautionary instruction, to cure prejudice

St v Nutley
24 Wis. 2d 527, 543
(1964)

2) When entire line of evidence relevant to liability of only one Def may be treated as evidence against all Defs by jury, merely because Defs tried jointly

St v Patricia M
168 Wis. 2d 724
(Ct. App. 1992),
rev'd on other grounds,
176 Wis. 2d 542 (1993)

a. If severance not granted in an "entire line of evidence" case, cautionary instruction must be given. Trial Ct duty-bound to give such cautionary instruction regardless of whether Def requests one or not

US v Echeles
352 F2d 892
(7th Cir 1965)

3) When Def unable to call a co-Def as witness for purpose of getting co-Def's prior statements, which tend to exculpate Def, because co-Def exercises right to remain silent

St v Rundle
166 Wis. 2d 715
(Ct. App. 1992)

4) When Def fails to move for severance, any claim of prejudicial joinder waived

C. Severance during trial itself

St v Nutley
24 Wis. 2d 527, 544
(1964)

1) May be ordered during trial if course of events running to prejudice of some co-Defs

2) Def must claim prejudice because of atmosphere of hostility generated by conduct of co-Def's Atty in Ct

DeLuna v US
308 F2d 140
(5th Cir 1962)

3) Co-Def Atty's comment to jury regarding Def's failure to testify at trial, grounds for severance

St v DiMaggio
49 Wis. 2d 565 (1971)

4) Option of Judge when substantial amount of evidence being developed as to one Def only

a. Order severance at that time

b. Give jury cautionary instruction that evidence against one Def may not be treated as evidence against another simply because Defs being tried at same time

St v Avery
215 Wis. 2d 45
(Ct. App. 1997)

6. Trial Practice Option

A. Trial Judge may wish to consider conducting one trial with totally separate juries for each severed Def

1) District Ct Administrator to handle jury logistics

2) Substantial time and expense savings as well as reduction of witness inconvenience possible

CR 19: SUPPRESSION—SEARCH AND SEIZURE

1. Warrant Requirement ..... CR 19-1
2. Procedure ..... CR 19-4
3. Use of Suppressed Evidence ..... CR 19-4
4. Expectation of Privacy (Standing) ..... CR 19-5
5. Challenges to Warrants ..... CR 19-11
6. Warrant Execution Issues ..... CR 19-13
7. Searches Pursuant to Arrest Warrants ..... CR 19-16
8. Exceptions to Warrant Requirement ..... CR 19-17
   - A. General Principles ..... CR 19-17
   - B. Search Incident to Arrest ..... CR 19-18
   - C. Consent ..... CR 19-20
   - D. Plain View and Plain Feel (Touch) ..... CR 19-23
   - E. Emergency Aid/Hot Pursuit ..... CR 19-24
   - F. Automobiles (Traffic Stops) ..... CR 19-25
   - G. Inventory Searches: Automobiles and Arrestees ..... CR 19-30
   - H. Community Caretaker Function ..... CR 19-31
   - I. Temporary Detention/Stop and Frisk ..... CR 19-32
   - J. School Searches ..... CR 19-36
   - K. Probation/Parole/Extended Supervision (persons on supervision) ..... CR 19-37
   - L. Law Enforcement Search of Person on Supervision ..... CR 19-38
   - M. Administrative Inspection ..... CR 19-38
   - N. Other Exceptions ..... CR 19-39

1. Warrant Requirement

US Const amend IV
Wis Const art 1, § 11

A. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

St v Payano-Roman
2006 WI 47
290 Wis. 2d 380
St v Cameron
2012 WI App 93, ¶ 23
344 Wis. 2d 101

1) Applies only to governmental searches, not private searches

St v Johnson
2013 WI App 140
352 Wis. 2d 98

2) May apply when foreign officials conduct searches targeting American citizens in foreign countries

Coolidge v New Hampshire
91 S. Ct. 2022 (1971)
Katz v US
88 S. Ct. 507 (1967)

3) Search conducted without prior approval of Judge is per se unreasonable

St v Johnston
184 Wis. 2d 794 (1994)

4) Burden is on State to demonstrate warrantless search or seizure fell within exceptions

Wong Sun v US
83 S. Ct. 407 (1963)
Mapp v Ohio
81 S. Ct. 1684 (1961)

5) Exclusionary rule generally requires suppression of evidence obtained through illegal police conduct

St v Burch
2021 WI 68, ¶¶ 16–17
398 Wis. 2d 1

a. Exclusionary rule is employed after weighing the police misconduct to be deterred with the societal cost of suppression

b. Police conduct must be sufficiently deliberate that exclusion can meaningfully deter it

B. Exceptions to suppression—Suppression not required if

Brewer v Williams
97 S. Ct. 1232 (1977)
St v Starke
81 Wis. 2d 399 (1978)

1) State learned of evidence from independent source

Alderman v US
89 S. Ct. 961 (1969)

a. Once Def makes prima facie showing of illegality, government must prove independent source by preponderance of evidence

St v Silverstein
2017 WI App 64, ¶ 19
378 Wis. 2d 42

b. Tip from agency with duty to report is not an anonymous tip

Utah v Strieff
136 S. Ct. 2056 (2016)
St v Artic
2010 WI 83
327 Wis. 2d 392
St v Phillips
218 Wis. 2d 180 (1998)
St v Anderson
165 Wis. 2d 441 (1991)
St v Rogers
2008 WI App 176
315 Wis. 2d 60

2) Illegal police conduct sufficiently attenuated. Factors to consider:

a. Temporal proximity of misconduct and statements/consent/seizure of evidence

b. Presence of intervening circumstances

c. Purpose/flagrancy of the official misconduct

St v Jackson
2016 WI 56
369 Wis. 2d 673

3) Evidence would have been discovered inevitably

St v Marquardt
2005 WI 157
286 Wis. 2d 204
St v Eason
2001 WI 98
245 Wis. 2d 206
St v Johnson
2013 WI App 140
352 Wis. 2d 98

4) Police reasonably rely on warrant issued by neutral magistrate, but later find warrant to be invalid and

a. Process used to obtain warrant included significant investigation, and

b. Review by police officer trained and knowledgeable in requirements of probable cause and reasonable suspicion, or

c. Review by knowledgeable governmental Atty

St v Scull
2015 WI 22, ¶ 23
361 Wis. 2d 288
St v Dearborn
2010 WI 84
327 Wis. 2d 252
St v Littlejohn
2010 WI 85
327 Wis. 2d 107
St v Ward
2000 WI 3
231 Wis. 2d 723

5) Police search and/or seizure relying in objective good faith on then applicable case law, and case law later changes

St v Guzy
134 Wis. 2d 399 415
(Ct. App. 1986), *aff'd in part, rev'd in part*
139 Wis. 2d 663 (1987)

6) After stop, Def freely consents to search

St v Baudhuin
141 Wis. 2d 642 (1987)

7) Police subjectively relied on incorrect exception and search was otherwise legal

Hudson v Michigan
126 S. Ct. 2159 (2006)

8) Police violate "knock-and-announce" rule

Herring v US
129 S. Ct. 695 (2009)
St v Rogers
2008 WI App 176
315 Wis. 2d 60

9) Police conduct alleged as grounds for suppression was merely negligent, nonrecurring, and attenuated from arrest, *not* deliberate

New York v Harris
110 S. Ct. 1640 (1990)
St v Felix
2012 WI 36
339 Wis. 2d 670

11) Evidence seized outside home after unlawful entry into home if police had probable cause to arrest before unlawful entry

2. Procedure

§ 971.31(5)(a)

A. Motion to suppress must be made within 10 days after initial appearance in misdemeanor or within 10 days after arraignment in felony

§ 971.31(5)(b)

1) In felony, motion must be made after information filed; not at prelim

§ 971.31(2)

2) If motion not made before trial, deemed waived unless Def shows surprise at State's possession of evidence

St v Radder
2018 WI App 36,
¶¶ 10–16,
382 Wis. 2d 749

B. Hold an evidentiary hearing only if Def's motion presents more than conclusory allegation and shows factual dispute

St v Zamzow
2017 WI 29
374 Wis. 2d 220

C. Right to confrontation does not apply during suppression hearing

D. Ct should make findings of fact and conclusions of law on record after pretrial evidentiary hearing

3. Use of Suppressed Evidence

James v Illinois
110 S. Ct. 648 (1990)
Walder v US
74 S. Ct. 354 (1954)

A. Otherwise inadmissible physical evidence may be used to impeach Def's trial testimony under limited circumstances

St v Garcia
2020 WI App 71
394 Wis. 2d 743
aff'd by equally divided ct
2021 WI 76
399 Wis. 2d 324

B. Otherwise inadmissible statement of Def, if made voluntarily, may be used to impeach Def at trial. *See* CR 21, Sec. 1.C.

St v Rush
147 Wis. 2d 225
(Ct. App. 1988)

C. Evidence suppressed at trial may be relied on at sentencing

4. Expectation of Privacy (Standing)

Bond v US
120 S. Ct. 1462 (2000)
Smith v Maryland
99 S. Ct. 2577 (1979)
St v Bruski
2007 WI 25
299 Wis. 2d 177
St v Stevens
123 Wis. 2d 303 (1985)
St v Sigarroa
2004 WI App 16
269 Wis. 2d 234

A. Ct must answer 2-part question

1) Whether individual, by his/her conduct, has exhibited actual expectation of privacy

2) Whether individual's expectation of privacy is one that society is prepared to recognize as reasonable

Rawlings v Kentucky
100 S. Ct. 2556 (1980)
St v Whitrock
161 Wis. 2d 960 (1991)

B. Def has burden of showing legitimate expectation of privacy

US v Padilla
113 S. Ct. 1936 (1993)
St v Fillyaw
104 Wis. 2d 700 (1981)
US v Payner
100 S. Ct. 2439 (1980)
Rakas v Illinois
99 S. Ct. 421 (1978)
Alderman v US
89 S. Ct. 961 (1969)
Katz v US
88 S. Ct. 507 (1967)

C. Expectation must be that of Def (not co-Def, co-conspirator, or 3rd party)

D. Situations in which Ct has recognized expectation of privacy

St v Ramirez
228 Wis. 2d 561
(Ct. App. 1999)

1) Addressee of package mailed, but not yet delivered

St v Earl
2009 WI App 99
320 Wis. 2d 639

a. However, no expectation of privacy in a package addressed to a fictitious person at a vacant apartment

Minnesota v Olson
495 US 91 (1990)
St v Curbello-Rodriguez
119 Wis. 2d 414, 424
(Ct. App. 1984)

2) Overnight apartment guest

Byrd v US
138 S. Ct. 1518 (2018)
St v Dixon
177 Wis. 2d 461 (1993)

3) Driver of a borrowed vehicle, including a rental car borrowed from the renter

St v Harris
206 Wis. 2d 243 (1996)

4) Automobile passengers challenging legality of stop

St v West
185 Wis. 2d 68 (1994)

5) Person living with probationer or parolee

St v Bowers
2023 WI App 4
405 Wis. 2d 716

6) Private cloud storage account even if created using work email

E. Factors to consider in determining expectation of privacy

1) Possession of item or area searched

US v Salvucci
100 S. Ct. 2547 (1980)
St v Wisumierski
106 Wis. 2d 722 (1982)

a. Def may have possession, yet no legitimate expectation of privacy

St v Knight
2000 WI App 16
232 Wis. 2d 305

2) Person's exercise of dominion and control over the property

Katz v US
88 S. Ct. 507 (1967)

3) Right to exclude others

Jones v US
80 S. Ct. 725 (1960)

4) Def's own right of access

St v Yakes
226 Wis. 2d 425
(Ct. App. 1999)

5) Others' right of access

6) Precautions taken to maintain privacy

California v Greenwood
108 S. Ct. 1625 (1988)

7) Subjective expectation of freedom from governmental intrusion

Katz v US
88 S. Ct. 507 (1967)
St v Guy
172 Wis. 2d 86 (1992)

8) Whether society recognizes expectation as objectively reasonable

9) Property interest in place searched

US v Martinez-Fuerte
96 S. Ct. 3074 (1976)

10) Whether privacy claim consistent with historical notions of privacy

F. Electronic data and devices

Kyllo v US
121 S. Ct. 2038 (2001)
St v Loranger
2002 WI App 5
250 Wis. 2d 198

1) If device is used to explore details of a private home that would previously have been unknowable without a physical intrusion, 4th Amendment protections apply

US v Jones
132 S. Ct. 945, 949 (2012)

2) Attachment of a GPS device to a vehicle and its use to monitor vehicle movements is a search, and a warrant is required

St v Pinder
2018 WI 106
384 Wis. 2d 416

a. GPS tracking warrant is issued under Ct's inherent authority and not per statute

St v Sveum
2010 WI 92
328 Wis. 2d 369

3) Order authorizing installation and monitoring of GPS tracking device on vehicle constitutes a valid warrant

St v Brereton
2013 WI 17
345 Wis. 2d 563

4) Warrantless seizure of vehicle to secure GPS warrant and install GPS device was based on probable cause, and GPS technology used did not exceed scope of warrant

Riley v California
134 S. Ct. 2473 (2014)

5) Warrant required to search information stored on a cell phone seized incident to arrest

Carpenter v US
138 S. Ct. 2206 (2018)

6) Warrant required to obtain personal location information, such as cell tower records

St v Bowers
2023 WI App 4
405 Wis. 2d 716

7) Warrant required to search cloud storage account even when created using non-private email

G. Privacy interest depends on place searched

California v Greenwood
108 S. Ct. 1625 (1988)
Hester v US
44 S. Ct. 445 (1924)
US v Akin
562 F2d 459
(7th Cir 1977)
Molina v St
53 Wis. 2d 662 (1972)

1) Abandoned or vacated property

St v Stevens
123 Wis. 2d 303, 319
(1985)
St v Yakes
226 Wis. 2d 425
(Ct. App. 1999)

a. Test is whether Def relinquished interest in property so no legitimate expectation of privacy when searched or no steps taken to privatize commercial enterprise

Friedman v US
347 F2d 697, 704
(8th Cir 1965)

b. Abandonment is ultimate fact or conclusion, based on combination of act and intent

2) Public view

Katz v US
88 S. Ct. 507 (1967)
Lewis v US
87 S. Ct. 424 (1966)
St v Davidson
44 Wis. 2d 177 (1969)

a. Not subject to 4th Amendment protection if knowingly exposed to public, even in own home or office

3) Curtilage

Hester v US
44 S. Ct. 445 (1924)
Ball v St
57 Wis. 2d 653 (1973)

a. 4th Amendment protection extends to house and its curtilage

St v Wilson
2022 WI 77, ¶ 20
404 Wis. 2d 623

b. Curtilage is determined by four factors:

- Proximity of area claimed to be curtilage to the home,
- Whether area is included within an enclosure surrounding the home,
- Nature of uses to which the area is put, and
- Steps taken by the resident to protect the area from observation by people passing by

St v Davis
2011 WI App 74
333 Wis. 2d 490

c. Attached garage is part of curtilage and uninvited police entry violates 4th Amendment

Collins v Virginia
138 S. Ct. 1663 (2018)

d. Part of driveway not generally used by visitors may be curtilage

St v Wilson
2022 WI 77, ¶¶ 21–34
404 Wis. 2d 623
Florida v Jardines
133 S. Ct. 1409 (2013)

e. "Knock and talk" investigation may allow entry into curtilage without constitutional violation

- Not confined to front doors or porches
- In limited fact-specific situations, may extend to alternative approaches to the house
- If invitation or license to approach exists

St v Dumstrey
2016 WI 3
366 Wis. 2d 64

f. Warrantless pursuit of OWI suspect into parking garage of apartment complex did not violate 4th Amendment, because parking garage was not curtilage

Florida v Jardines
133 S. Ct. 1409 (2013)

g. Warrant required for canine sniff of curtilage, including front porch

4) Open fields

Hester v US
44 S. Ct. 445 (1924)
Ball v St
57 Wis. 2d 653 (1973)

a. 4th Amendment protection extends to house and its curtilage, but not to open fields

Conrad v St
63 Wis. 2d 616 (1974)
St v Verhagen
86 Wis. 2d 262
(Ct. App. 1978)

b. State must prove open fields exception and Def must prove expectation of privacy of item located in curtilage open to public

California v Ciraolo
106 S. Ct. 1809, 1817
(1986)
St v Grawien
123 Wis. 2d 428, 436
(Ct. App. 1985)

c. Area open to view from above, even if a "focused observation," retains no expectation of privacy from aerial surveillance even if within curtilage

St v Peck
143 Wis. 2d 624
(Ct. App. 1988)

- Use of binoculars to spot marijuana growing on farm curtilage did not violate expectation of privacy

Dow Chem Co v US
106 S. Ct. 1819, 1824
(1986)
Florida v Riley
109 S. Ct. 693 (1989)

d. Warrantless aerial photographs from public air space not a search

5) No legitimate expectation of privacy in

St v Garcia
195 Wis. 2d 68
(Ct. App. 1995)

a. Automobile exterior

Bell v Wolfish
99 S. Ct. 1861 (1979)

b. Penal institutions

US v Tierney
448 F2d 37
(9th Cir 1971)

c. Foreign countries

St v Weide
155 Wis. 2d 537 (1990)

d. Custodial inventory searches

St v Betterley
191 Wis. 2d 406 (1995)

e. Property properly held in police inventory

St v Starke
81 Wis. 2d 399 (1978)

Griffin v Wisconsin
107 S. Ct. 3164 (1987)
St v Jones
2008 WI App 154
314 Wis. 2d 408

St v Amos
153 Wis. 2d 257
(Ct. App. 1989)

St v Weber
163 Wis. 2d 116 (1991)

St v Roberts
196 Wis. 2d 445
(Ct. App. 1995)

Minnesota v Carter
119 S. Ct. 469 (1998)

St v Eskridge
2002 WI App 158
256 Wis. 2d 314
St v Trecroci
2001 WI App 126
246 Wis. 2d 261

St v Orta
2003 WI App 93
264 Wis. 2d 765

Isaiah B v St
(In Int of Isaiah B)
176 Wis. 2d 639 (1993)

St v Baric
2018 WI App 63
384 Wis. 2d 359

Coolidge v
New Hampshire
91 S. Ct. 2022 (1971)

St v Jenkins
80 Wis. 2d 426 (1977)

Walter v US
100 S. Ct. 2395 (1980)

St v Rogers
148 Wis. 2d 243
(Ct. App. 1988)

f. Public records

g. Rooms or residences occupied by individuals on probation, parole, or extended supervision

h. Homes occupied by escapees

i. Cassette tape left in unlocked car

j. Vehicle abandoned by Def fleeing scene of arrest

k. Apartment temporarily utilized by non-renter invitee to conduct illegal business activities

l. Common areas of some apartment buildings

m. Shared public restroom stall (in limited circumstances)

n. Student lockers

o. Files shared publicly on a P2P (peer-to-peer) network

H. Private search vs. government search

1) 4th Amendment protection applies only to actions by governmental officials, not by private persons acting on own initiative

2) Government may not expand privately conducted search without warrant or consent

3) Def must prove by preponderance of evidence that private party was acting as governmental agent

5. Challenges to Warrants

A. Challenge to truthfulness of affidavits in support of issuance of warrants

Franks v Delaware
98 S. Ct. 2674 (1978)

1) Under limited circumstances, Def may attack truthfulness of warrant affidavit

   a. Def makes a substantial preliminary showing that affidavit contains false statements that were knowingly, intentionally, or recklessly made, and

   b. Def shows that magistrate could not have found probable cause, but for the false or untrue information

2) If both criteria are met, Def then entitled to evidentiary hearing at which Def must prove Def's allegations by preponderance of evidence before suppression is required

St v Marshall
92 Wis. 2d 101 (1979)

3) Hearing required only when affiant, not witness or informant, makes allegedly false statements

St v Stank
2005 WI App 236
288 Wis. 2d 414

4) Mere desire to cross-examine does not justify an evidentiary hearing

B. Defective warrants

St v Noll
116 Wis. 2d 443 (1984)

1) Defect in warrant may invalidate only portion of warrant

St v Eason
2001 WI 98
245 Wis. 2d 206
St v Scull
2014 WI App 17
352 Wis. 2d 733
aff'd, 2015 WI 22
361 Wis. 2d 288

2) Defective warrant may not require suppression if State shows

   a. Police relied on warrant issued by independent magistrate, and

   b. Process used to obtain warrant included significant investigation and review either by police officer trained and knowledgeable in requirements of probable cause and reasonable suspicion, or by knowledgeable governmental Atty

St v Tye
2001 WI 124
248 Wis. 2d 530

3) Warrant issued pursuant to unsigned affidavit is defective, and evidence seized pursuant to it must be suppressed

St v Moeser
2022 WI 76, ¶ 28
405 Wis. 2d 1
cert denied
143 S. Ct. 2612 (2023)

4) No rigid requirements or magic words for oath; purpose of oath or affirmation is to impress upon swearing individual appropriate sense of obligation to tell truth

St v Jackson
2008 WI App 109
313 Wis. 2d 162

5) Warrant to search "duplex" must present probable cause to search particular unit or probable cause to search entire building

C. Issuance by unauthorized person

St v Grawien
123 Wis. 2d 428
(Ct. App. 1985)

1) Fruits of search warrant are subject to suppression, if magistrate was not authorized to issue warrants

St v McBride
187 Wis. 2d 409
(Ct. App. 1994)

2) Def must demonstrate bias of issuing magistrate by preponderance of evidence

D. Motion to suppress challenging probable cause

Illinois v Gates
103 S. Ct. 2317 (1983)
St v Romero
2009 WI 32
317 Wis. 2d 12
St v Ward
2000 WI 3
231 Wis. 2d 723
St v DeSmidt
155 Wis. 2d 119 (1990)

1) Challenger bears burden of demonstrating that evidence before issuing magistrate was clearly insufficient

2) "Great deference" paid to issuing magistrate's decision

St v Ritchie
2000 WI App 136
237 Wis. 2d 664

3) Deferential standard applies to both search warrants and arrest warrants issued based on allegations recited in criminal complaint

St v Casarez
2008 WI App 166
314 Wis. 2d 661
St v Sloan
2007 WI App 146
303 Wis. 2d 438

4) Affidavit in support of a warrant to search a home must establish probable cause to believe that a nexus exists between the items sought and the residence to be searched

St v Carroll
2008 WI App 161
314 Wis. 2d 690, *aff'd*,
2010 WI 8
322 Wis. 2d 299

5) Officer may answer calls on a cell phone seized incident to arrest, and information learned during calls may be used to secure warrant

St v Simmons
220 Wis. 2d 775
(Ct. App. 1998)

E. Warrant may be based on illegally obtained information if causal connection between information and warrant so attenuated as to dissipate taint

6. Warrant Execution Issues

A. General rules on execution of warrant

St v Avery
2011 WI App 124, ¶ 18
337 Wis. 2d 351

1) "One warrant, one search," but exception permitted for subsequent entry and search when (a) 2nd entry is a continuation of the 1st search and (b) decision to enter again is reasonable under the circumstances

§ 968.15(1), § 968.17(1)

2) A search warrant not executed within 5 days after issuance is void and is grounds for suppression

St v Meier
60 Wis. 2d 452
(1973)

3) Failure to return warrant within 48 hours after execution is not grounds for suppression

St v Edwards
98 Wis. 2d 367 (1980)

4) Delay in execution (within 5-day period) impermissible if facts essential to issuance dissipate

St v Drachenberg
2023 WI App 61
409 Wis. 2d 738
pet for rev denied

5) Forensic analysis of devices seized is not part of the warrant's 5-day execution period

a. Ct must determine if probable cause continued to exist at time of execution irrespective of reasons for delay

b. Def bears burden of proof

St v Pinder
2018 WI 106
384 Wis. 2d 416

c. GPS tracking warrant does not seek documents or data under the control of the vehicle owner and is not subject to the execution and return provisions of §§ 968.15 and 968.17(1)

Illinois v McArthur
121 S. Ct. 946 (2001)

6) Warrantless entry or temporary seizure to secure premises will not result in suppression if information sufficient for warrant already in hand and warrant issued short time later

§ 968.14
St v Suits
73 Wis. 2d 352 (1976)

Wilson v Arkansas
115 S. Ct. 1914 (1995)
St v Watkinson
161 Wis. 2d 750
(Ct. App. 1991)

Richards v Wisconsin
117 S. Ct. 1416 (1997)
St v Larson
215 Wis. 2d 155
(Ct. App. 1997)
St v Stevens
213 Wis. 2d 324
(Ct. App. 1997)
summarily aff'd and remanded
217 Wis. 2d 369 (1998)

St v DeSmidt
151 Wis. 2d 324
(Ct. App. 1989)
rev'd on other grounds
155 Wis. 2d 119 (1990)

St v Stevens
181 Wis. 2d 410 (1994)

St v O'Brien
214 Wis. 2d 328
(Ct. App. 1997)
aff'd, 223 Wis. 2d 303
(1999)

Ybarra v Illinois
100 S. Ct. 338 (1979)

§ 968.16
Bailey v US
133 S. Ct. 1031 (2013)
Michigan v Summers
101 S. Ct. 2587 (1981)
St v Guy
172 Wis. 2d 86 (1992)
St v Kolp
2002 WI App 17
250 Wis. 2d 296

St v Hayes
196 Wis. 2d 753
(Ct. App. 1995)

7) Necessary force may be used to gain entry or execute warrant

8) Absent exigent circumstances, police must knock, announce presence and purpose, and allow those within to voluntarily open door

9) "No-knock" entry permitted if police have reasonable suspicion based on specific and articulable facts that announcing their presence will endanger their safety or permit destruction of evidence

10) Overbroad warrant may not be saved by exercise of discretion in execution

11) Execution of search warrant may be effectuated by ruse

12) Warrant for search of premises may permit search of vehicles owned or controlled by owner

B. Search of individuals on premises during warrant execution

1) No probable cause needed to detain persons on the premises during warrant execution so long as the detention is in the immediate vicinity

2) Warrants may direct search of "all occupants" of a residence, if presence of likely guilty persons demonstrated to a reasonable probability

St v Andrews
201 Wis. 2d 383 (1996)

3) Officers may search visitor's belongings, if they are plausible repositories of objects of search and are neither worn by nor in physical possession of visitor at time of search

St v Ehnert
160 Wis. 2d 464
(Ct. App. 1991)

C. Evidence underlying warrant must not be stale

Richards v Wisconsin
117 S. Ct. 1416 (1997)
St v Watkinson
161 Wis. 2d 750
(Ct. App. 1991)

D. "No-knock" warrant may be issued if specific evidence of danger presented

1) Search is reasonable under 4th Amendment even if police dispense with rule of announcement and execute no-knock entry when

   a. Police have reasonable belief that announcement of police presence would endanger safety of police or others, or

   b. Police have reasonable belief that unannounced entry is required to prevent destruction of evidence

St v Berry
174 Wis. 2d 28
(Ct. App. 1993)

   c. Announcement would be futile

Richards v Wisconsin
117 S. Ct. 1416 (1997)

2) There is no blanket "drug house" exception to the "knock and announce" rule

St v Stevens
217 Wis. 2d 369 (1998)
aff'g 213 Wis. 2d 324
(Ct. App. 1997)
St v Meyer
216 Wis. 2d 729 (1998)

3) While officer's general information regarding drug transactions may not be sufficient to support a no-knock warrant, basis may be established by evidence of officer's training and experience in conjunction with particular facts of case

St v Henderson
2001 WI 97
245 Wis. 2d 345
St v Whiting
2003 WI App 101
264 Wis. 2d 722

4) Irrespective of whether search warrant authorizes no-knock entry, reasonableness not determined at time warrant issued but when executed

St v LaCount
2008 WI 59
310 Wis. 2d 85

E. Items not particularized in search warrant may be seized if

1) Evidence discovered during lawful search, and

2) Evidence, with facts known to officer before search, provides connection between evidence and criminal activity, and

3) Evidence discovered within area properly designated in warrant, and

4) Evidence discovered while officer searching for objects particularized in warrant

LeClair v Hart
800 F2d 692
(7th Cir 1986)

F. Dictating contents of documents outside scope of warrant into tape recorder is a seizure

7. Searches Pursuant to Arrest Warrants

A. Execution of arrest warrants at residences of third parties (when search warrant is/is not required)

Payton v New York
100 S. Ct. 1371, 1388
(1980)
St v Blanco
2000 WI App 119
237 Wis. 2d 395

1) Police may enter dwelling to serve warrant only when there is reason to believe suspect resides there and is present within

Steagald v US
101 S. Ct. 1642 (1981)
St v Kiper
193 Wis. 2d 69 (1995)

2) Absent consent or exigent circumstances, search warrant is required to enter an individual's home in order to execute arrest warrant for 3rd party believed to be present there

St v Delap
2018 WI 64
382 Wis. 2d 92

B. Absent hot pursuit, consent, or exigent circumstances, warrant required for home entry to effectuate routine felony arrest

St v Lee
97 Wis. 2d 679
(Ct. App. 1980)

C. Def, mistakenly arrested on warrant naming another person, cannot suppress evidence if officer acted in good faith

St v Kiper
193 Wis. 2d 69 (1995)

D. Simple belief that subject of arrest warrant is present in home of third person is not sufficient to justify warrantless search of that home

8. Exceptions to Warrant Requirement

A. General Principles

Arkansas v Sanders
99 S. Ct. 2586 (1979)
US v Jeffers
72 S. Ct. 93 (1951)
St v Johnston
184 Wis. 2d 794 (1994)
St v Verhagen
86 Wis. 2d 262, 265
(1978)

1) Burden on government to justify appropriate exception to warrant requirement

Bell v Wolfish
99 S. Ct. 1861 (1979)
St v Flynn
92 Wis. 2d 427, 445
(1979)

a. Test of reasonableness under 4th Amendment requires balance of need for search against invasion of personal rights search entails

St v Stevens
173 Wis. 2d 290
(Ct. App. 1992)
aff'd in part, rev'd in part
181 Wis. 2d 410 (1994)

b. Judge should consider scope of intrusion, manner in which conducted, justification, and place where conducted

Agnello v US
46 S. Ct. 4 (1925)
Laasch v St
84 Wis. 2d 587, 594
(1978)
St v Monahan
76 Wis. 2d 387 (1977)

2) Mere belief that article sought concealed in residence will not justify warrantless search, notwithstanding facts showing probable cause

Mincey v Arizona
98 S. Ct. 2408 (1978)
Coolidge v
New Hampshire
91 S. Ct. 2022 (1971)

3) Reach of each exception limited to what is necessary to meet identified needs of society

Kentucky v King
131 S. Ct. 1849, 1858
(2011)

4) Warrantless entry based on exigent circumstances is reasonable when police did not create exigency by engaging or threatening to engage in conduct violating 4th Amendment

St v Smith
131 Wis. 2d 220, 228
(1986)
St v Bourgeois
2022 WI App 18,
¶¶ 17–19, 28
401 Wis. 2d 489
pet for rev denied

5) Warrantless entry because of exigent circumstances requires urgent need to enter coupled with insufficient time to get a warrant

St v Robinson
2010 WI 80, ¶ 30
327 Wis. 2d 302
St v Parisi
2014 WI App 129
359 Wis. 2d 255

Lange v California
141 S. Ct. 2011 (2021)
St v Weber
2016 WI 96
372 Wis. 2d 202
(plurality)

6) Four factors have been identified that, when measured against time needed to obtain warrant, constitute exigent circumstances required for warrantless home entry

   a. Arrest made in "hot pursuit" on a case-by-case analysis

   b. Threat to safety of suspect or others

   c. Risk that evidence would be destroyed, and

   d. Likelihood that suspect would flee

St v Dalton
2018 WI 85, ¶¶ 44–54
383 Wis. 2d 147

7) Exigent circumstances for a warrantless blood draw can arise because of chaotic circumstances associated with major traffic crashes (*See* **TR 1, Sec. 12.B.**10))

Illinois v Caballes
125 S. Ct. 834 (2005)
St v Arias
2008 WI 84
311 Wis. 2d 358

8) A "drug dog" sniff does not constitute a search

B. Search Incident to Arrest

§ 968.11
Chimel v California
89 S. Ct. 2034 (1969)

1) Arresting officer entitled to search person and immediate vicinity for weapons and fruits of crime, pursuant to valid arrest

   a. Immediate vicinity is area within which person might gain possession of weapon or destructible evidence

St v Sanders
2008 WI 85
311 Wis. 2d 257

St v Meisenhelder
2022 WI App 37
404 Wis. 2d 75
pet for rev denied

   b. Size or nature of area searched is not determinative as long as weapons or evidence of crime could be concealed within

St v Goebel
103 Wis. 2d 203, 217–18
(1981)

   c. Search must be substantially contemporaneous with arrest, but may occur after incarceration

St v Wade
215 Wis. 2d 684
(Ct. App. 1997)

§ 968.11

St v Paszek
50 Wis. 2d 619, 624–25
(1971)

St v Sykes
2005 WI 48
279 Wis. 2d 742

St v Moore
2023 WI 50
408 Wis. 2d 16

Winston v Lee
105 S. Ct. 1611 (1985)

St v Payano-Roman
2006 WI 47
290 Wis. 2d 380

Washington v Chrisman
102 S. Ct. 812 (1982)

St v Tompkins
144 Wis. 2d 116 (1988)

Knowles v Iowa
119 S. Ct. 484 (1998)

St v Marten-Hoye
2008 WI App 19
307 Wis. 2d 671

Arizona v Gant
129 S. Ct. 1710 (2009)
St v Dearborn
2010 WI 84
327 Wis. 2d 252
St v Smiter
2011 WI App 15
331 Wis. 2d 431

d. Same concerns that would justify initial search need to continue to exist to justify delayed search

2) Justification is to prevent assault on police with weapons, escape, or destruction of evidence

3) If arrest invalid, search incident to arrest also invalid

4) Search incident to arrest is lawful if officer has probable cause to arrest before the search and Def is arrested immediately thereafter, although for a different crime

Officer who smells odor of marijuana has probable cause to search and need not rule out legal sources of the odor such as CBD

5) Removing bullet violates suspect's 4th Amendment right to privacy; reasonableness of surgical intrusions beneath the skin to be evaluated on case-by-case basis

6) Involuntary administration of laxative to recover suspected drugs was reasonable under the circumstances

7) When police accompany arrested person to room to retrieve identification, they may seize contraband in plain view

8) Search incident to arrest does not extend to vehicle parked outside building where Def arrested

9) Search may be incident to arrest for noncriminal traffic violation, but full search of car upon issuance of citation is violation of 4th Amendment

10) Police may not search person or vehicle incident to the issuance of a civil forfeiture citation

11) Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest

St v Coffee
2020 WI 53
391 Wis. 2d 831

After OWI arrest, search of passenger compartment and contents requires reason to believe evidence of the offense may be found, including different intoxicating substances or proof of ingestion or proof of purchase

St v Denk
2008 WI 130
315 Wis. 2d 5

12) Unarrested automobile passengers

a. Person of an unarrested passenger can never be searched solely on grounds that search is incident to the arrest of the driver

b. Under some circumstances, the belongings of an unarrested passenger may be searched incident to driver's arrest

Riley v California
134 S. Ct. 2473 (2014)

13) Warrant required to search information stored on a cell phone seized incident to arrest

C. Consent

US v Matlock
94 S. Ct. 988 (1974)
St v McGovern
77 Wis. 2d 203, 211
(1977)

1) When consent obtained, neither warrant nor probable cause required

US v Mendenhall
100 S. Ct. 1870 (1980)
St v Fillyaw
104 Wis. 2d 700 (1981)
St v Mazur
90 Wis. 2d 293, 302
(1979)

2) Burden on State to show by clear and convincing evidence that consent to warrantless search freely and voluntarily given

St v Goetsch
186 Wis. 2d 1
(Ct. App. 1994)

a. Consent given by Def during improper interrogation may be voluntary and not fruit of poisonous interrogation, if evidence obtained in search was not disclosed during interrogation

Schneckloth v Bustamonte
93 S. Ct. 2041 (1973)
St v Williams
2001 WI App 249
248 Wis. 2d 361,
rev'd, 2002 WI 94
255 Wis. 2d 1
St v Phillips
218 Wis. 2d 180 (1998)
St v Bermudez
221 Wis. 2d 338
(Ct. App. 1998)

b. Voluntariness is factual question based on "totality of all the circumstances"

St v Johnson
2007 WI 32
299 Wis. 2d 675
St v Giebel
2006 WI App 239
297 Wis. 2d 446

c. Consent must be more than mere acquiescence to a claim of lawful authority

US v Mendenhall
100 S. Ct. 1870 (1980)
US v Matlock
94 S. Ct. 988 (1974)

d. Consenting party's knowledge of right to refuse is highly relevant to determination of consent, but not controlling

Georgia v Randolph
126 S. Ct. 1515 (2006)

e. When consent is disputed by occupants who are physically present, there is no consent

St v St Martin
2011 WI 44, ¶ 6
334 Wis. 2d 290

f. Co-tenant's on-site consent trumps refusal to consent by other tenant who is under arrest nearby, but not on the premises

St v Artic
2010 WI 83
327 Wis. 2d 392
St v Phillips
218 Wis. 2d 180 (1998)

3) When consent obtained after 4th Amendment violation, inquiry is whether evidence results from exploitation of police illegality or by means sufficiently attenuated so as to purge the taint

St v Richter
2000 WI 58
235 Wis. 2d 524
St v Bermudez
221 Wis. 2d 338
(Ct. App. 1998)

4) Attenuation factors for Ct to consider:

a. Temporal proximity

b. Intervening circumstances

c. Purpose and flagrancy of intervening conduct

US v Matlock
94 S. Ct. 988 (1974)
St v McGovern
77 Wis. 2d 203 (1977)

5) Third party may consent to search if has common authority over, or sufficient relationship to premises or effects

St v Verhagen
86 Wis. 2d 262
(Ct. App. 1978)

a. Not derived from property law, but from mutual use of property by persons with joint access and control

- Divorced wife had no standing to consent because of separation

St v Abbott
2020 WI App 25
392 Wis. 2d 232

- Estranged spouse may consent if still residing in same house

St v Sobczak
2013 WI 52
347 Wis. 2d 724

- Def's girlfriend who was weekend guest had authority to invite law enforcement to enter Def's residence and view suspicious files on computer

St v Tomlinson
2002 WI 91
254 Wis. 2d 502

- Homeowner's teenage child may consent to entry to home's common areas

McDonald v US
69 S. Ct. 191 (1948)
Stoner v California
84 S. Ct. 889 (1964)
St v Kieffer
217 Wis. 2d 531 (1998)

- Landlords and hotel clerks have limited authority to give consent to search

St v West
185 Wis. 2d 68 (1994)

- Implied consent of probationer or parolee may extend to others in residence

Fernandez v California
134 S. Ct. 1126 (2014)
Georgia v Randolph
126 S. Ct. 1515 (2006)

b. If two persons have equal rights in the premises and both are present at time of search, any evidence obtained will be inadmissible against nonconsenting /party

Illinois v Rodriguez
110 S. Ct. 2793 (1990)
St v Kieffer
217 Wis. 2d 531 (1998)
St v Torres
2018 WI App 23
381 Wis. 2d 268

c. Consent may be valid if police reasonably believed third party had apparent common authority, even though third party did not have actual authority

St v Goebel
103 Wis. 2d 203, 215–16 (1981)

6) If Def consents to show part of property and accidentally displays contraband, police may seize it

St v Wheeler
2013 WI App 53, ¶ 25
347 Wis. 2d 426

7) Police permitted to search where the object sought would be found

St v Jereczek
2021 WI App 30
398 Wis. 2d 226

8) If scope of consent limited, limitation must be followed

St v Douglas
123 Wis. 2d 13, 21 (1985)

9) Implied consent to search home does not justify second search two days later

St v Johnston
184 Wis. 2d 794 (1994)

10) Consent given to undercover officer may be considered as consent to all back-up officers

11) See also Automobiles, **Sec. F.**, *infra*

D. Plain View and Plain Feel (Touch)

Harris v US
88 S. Ct. 992 (1968)
Washington v Chrisman
102 S. Ct. 812 (1982)
St v Altenburg
150 Wis. 2d 663
(Ct. App. 1989)

1) Police must have lawful right to be present pursuant to warrant or other exception in order to seize evidence in plain view

Bies v St
76 Wis. 2d 457, 469–70
(1977)

a. Subject to reasonableness requirement

Bies v St
76 Wis. 2d 457, 473
(1977)
St v Bell
62 Wis. 2d 534, 542
(1974)

b. Not to be used to subvert warrant requirement when police know of location of evidence and plan to seize

Steele v US
45 S. Ct. 414 (1925)

c. No justification for entry when evidence viewed from outside protected structure, i.e., no thresholds crossed

Thompson v Louisiana
105 S. Ct. 409 (1984)

d. Warrant needed when investigators arrived at homicide scene 35 minutes after police left

New York v Class
106 S. Ct. 960 (1986)

e. No reasonable expectation of privacy in vehicle identification number even when officer has to move papers to see it

Arizona v Hicks
107 S. Ct. 1149 (1987)

f. When initial intrusion to residence was to investigate a shooting, moving stereo to see serial numbers was unlawful search

Horton v California
110 S. Ct. 2301 (1990)

2) Discovery of evidence does not need to be inadvertent

St v Sutton
2012 WI App 7
338 Wis. 2d 338

3) Officer must have probable cause to believe evidence seized only connected to commission of crime

Texas v Brown
103 S. Ct. 1535 (1983)
St v Pozo
198 Wis. 2d 705
(Ct. App. 1995)
St v Johnson
187 Wis. 2d 237
(Ct. App. 1994)

a. Items in opaque containers may be seized if officer has probable cause to believe contraband contained inside

St v Washington
134 Wis. 2d 108, 121
(1986)

b. "Plain view" not restricted to items that can be seen, but includes items that can be smelled, touched, heard, or tasted

E. Emergency Aid/Hot Pursuit

Brigham City v Stuart
126 S. Ct. 1943 (2006)
Warden v Hayden
87 S. Ct. 1642 (1967)
St v Ware
2021 WI App 83
400 Wis. 2d 118
St v Larsen
2007 WI App 147
301 Wis. 2d 718

1) If objectively reasonable basis for belief that an occupant of home is seriously injured or imminently threatened with injury, no warrant required

St v Prober
98 Wis. 2d 345, 360–65
(1980)
overruled in part by
St v Weide
155 Wis. 2d 537 (1990)
St v Kraimer
99 Wis. 2d 306 (1980)

2) Police must reasonably believe, both objectively and subjectively, that aid necessary

a. Exception strictly construed to keep as narrow as possible

LaFournier v St
91 Wis. 2d 61, 67 (1979)

b. Limited to extent and duration of emergency

US v Santana
96 S. Ct. 2406 (1976)
West v St
74 Wis. 2d 390 (1976)

3) Suspect may not defeat arrest set in motion in public place by escaping to private place

Warden v Hayden
87 S. Ct. 1642 (1967)

4) When armed felon flees into house immediately before police arrive, police may search as broadly as reasonably necessary to prevent resistance or escape

Lange v California
141 S. Ct. 2011
(2021)

5) If time allows, a warrant is required when suspected misdemeanant flees into house

A law enforcement emergency, such as imminent harm, destruction of evidence, or escape from the home, may justify warrantless entry

US v Fleming
677 F2d 602
(7th Cir 1982)

6) Deterioration of evidence over time may justify warrantless search in hot pursuit

St v Ionescu
2019 WI App 68
389 Wis. 2d 586

St v Kryzaniak
2001 WI App 44
241 Wis. 2d 358

Welsh v Wisconsin
104 S. Ct. 2091 (1984)
St v Weber
2016 WI 96
372 Wis. 2d 202
(plurality)

St v Peardot
119 Wis. 2d 400, 404
(Ct. App. 1984)

St v Wilson
2022 WI 77, ¶ 38
404 Wis. 2d 623

St v Londo
2002 WI App 90
252 Wis. 2d 731

St v Pires
55 Wis. 2d 597 (1972)
St v Rome
2000 WI App 243
239 Wis. 2d 491

St v Kirby
2014 WI App 74
355 Wis. 2d 423

7) Warrantless entry of home justifiable under hot pursuit doctrine if pursuit is immediate or continuous

8) Warrantless entry of home to arrest subject of civil capias not justified

9) Warrantless entry of suspect's home for nonjailable offense prohibited by 4th Amendment

10) After "controlled buy" of narcotics, warrantless entry into suspect's home justified by exigent circumstances

11) "Hot pursuit" permits entry into protected area only if pursuit is immediate and continuous

12) Police may enter dwelling to investigate ongoing burglary

13) No warrant required when searching officer motivated by perceived need to render aid, and reasonable person would believe emergency exists

14) Officer safety justified step across the threshold to check backpack for sawed-off shotgun

F. Automobiles (Traffic Stops)

St v Wright
2019 WI 45, ¶ 8
381 Wis. 2d 495

1) A traffic stop is a seizure

Arizona v Johnson
129 S. Ct. 781, 788 (2009)
St v Salonen
2011 WI App 157, ¶ 10
338 Wis. 2d 104

2) A roadside stop ordinarily begins when a vehicle is pulled over for a traffic violation and ends when the police no longer have further need to control the scene, after which the driver and passengers are free to leave

§ 175.40(2)

3) Police officer may, when in fresh pursuit, follow anywhere in State and stop/arrest any person for violation of any law officer authorized to enforce

City of Brookfield v Collar
148 Wis. 2d 839
(Ct. App. 1989)

a. Officer must act without unnecessary delay

b. Pursuit must be continuous and uninterrupted, although continuous surveillance not required

c. Commission of offense, commencement of pursuit, and apprehension of suspect should be close in time

St v Wright
2019 WI 45, ¶ 9
381 Wis. 2d 495

4) The mission of a traffic stop includes:

a. Addressing the traffic violation

b. Conducting ordinary inquiries incident to the stop, such as

St v Smith
2018 WI 2
379 Wis. 2d 86

- Driver's identification, registration, and insurance

St v Davis
2021 WI App 65, ¶ 27
399 Wis. 2d 354

- Warrant status

- Bond conditions

— Stop may not be prolonged absent independent reasonable suspicion of violations

c. Taking negligibly burdensome precautions for officer safety while completing the mission of the traffic stop

St v Floyd
2017 WI 78, ¶ 28
377 Wis. 2d 394

- Including questions about the presence of any weapons and asking to search the driver

St v Brown
2020 WI 63
392 Wis. 2d 454

- Even if asked after writing the ticket and just before releasing the driver

5) Reasonable suspicion for traffic stop judged on totality of circumstances

St v Popke
2009 WI 37
317 Wis. 2d 118
St v Post
2007 WI 60
301 Wis. 2d 1

a. Weaving within single lane of traffic does not alone give grounds for stop, but operating left of center may

St v Iverson
2015 WI 101
365 Wis. 2d 302

b. Traffic stop may be based solely on observation of nontraffic forfeiture offense such as littering by a passenger

St v Richey
2022 WI 106
405 Wis. 2d 132

c. Traffic stop based on observations of another officer requires sufficient evidence to infer driver being stopped was driver observed

US v Johnson
874 F3d 571
(7th Cir 2017)
St v Genous
2021 WI 50
397 Wis. 2d 293

d. If police suspect unlawful conduct, not required to wait and rule out possible lawful exceptions

Kansas v Glover
140 S. Ct. 1183 (2020)
St v Newer
2007 WI App 236
306 Wis. 2d 193

e. Knowledge that owner's license is revoked provides grounds for a stop unless officer has reason to believe owner is not the driver

St v Smith
2018 WI 2
379 Wis. 2d 86

- Even if reason for stop dissipates, police may continue stop to make "ordinary inquiries," including check of driver's identification

St v Sherry
2004 WI App 207
277 Wis. 2d 194
St v Marquardt
2001 WI App 219
247 Wis. 2d 765

6) Auto may be searched without warrant if there is probable cause to search vehicle, and vehicle is readily mobile

a. For a search of auto incident to arrest, see **Sec. B.**8)–12) above

St v Buchanan
2011 WI 49
334 Wis. 2d 379

7) Warrantless nonconsensual search of passenger compartment for officer safety is permitted only if officer has objective reason to believe that suspect is dangerous and may gain immediate control of weapons

St v VanBeek
2021 WI 51
297 Wis. 2d 311

8) Taking driver's license to squad car to run the record could transform a consensual encounter into a seizure based on totality of the circumstances

a. No bright-line rule

b. Retaining driver's license, without reasonable suspicion, a key factor in whether an unlawful seizure has occurred

St v Davis
2021 WI App 65
399 Wis. 2d 354

9) Absent reasonable suspicion, extension of stop solely to check conditions of driver's release on bail or bond violates 4th Amendment

Illinois v Caballes
125 S. Ct. 834 (2005)
St v Arias
2008 WI 84
311 Wis. 2d 358

10) Use of drug dog to sniff exterior of car during lawful traffic stop does not infringe 4th Amendment

a. Unless dog sniff extends stop beyond original purpose without reasonable suspicion (*See infra* **Sec. F.11**))

St v Campbell
No. 2020AP1813-CR
2024 WL 934246
(Wis. Ct. App. 3/5/2024)
(publication recommended)
pet for rev filed

b. Entry into vehicle by dog constitutes search requiring consent or other exception

St v Adell
2021 WI App 72, ¶ 16
399 Wis. 2d 399
St v Betow
226 Wis. 2d 90, 94–95
(Ct. App. 1999)

11) Stop may be extended and new investigation begun if

a. Officer becomes aware of additional suspicious factors rising to an articulable suspicion that person committed or is committing an offense distinct from acts that prompted initial stop

b. Validity of extension is tested with same criteria as initial stop

Rodriguez v US
135 S. Ct. 1609 (2015)
St v House
2013 WI App 111
350 Wis. 2d 473

12) Extension of stop beyond original purpose to conduct dog sniff violates 4th Amendment

13) Consent to search incident to or after traffic stop

St v Floyd
2017 WI 78, ¶¶ 29–34
377 Wis. 2d 394
St v Williams
2002 WI 94
255 Wis. 2d 1
St v Luebeck
2006 WI App 87
292 Wis. 2d 748

a. Voluntariness determined based on totality of the circumstances

Ohio v Robinette
117 S. Ct. 417 (1996)

b. 4th Amendment does not require that seized persons be advised they are free to go before consent can be found to be voluntary

St v Wantland
2014 WI 58
355 Wis. 2d 135

c. Limitations of consent must be clear and unequivocal

Arkansas v Sullivan
121 S. Ct. 1876 (2001)
US v Johnson
874 F3d 571
(7th Cir 2017)

14) Ulterior motives of police irrelevant so long as there is probable cause for traffic stop

St v Secrist
224 Wis. 2d 201 (1999)

15) Warrantless search of automobile found in public place is justified when police have probable cause to believe it contains evidence of crime

Chambers v Maroney
90 S. Ct. 1975 (1970)

a. May seize and search later at police station, if probable cause existed when seized

US v Mazzone
782 F2d 757, 759
(7th Cir 1986)

b. If officer has probable cause to believe closed container in car contains contraband, warrantless search permitted

Wyoming v Houghton
119 S. Ct. 1297 (1999)
St v Matejka
2001 WI 5
241 Wis. 2d 52
St v Jackson
2013 WI App 66, ¶ 8
348 Wis. 2d 103
St v Lefler
2013 WI App 22, ¶ 11
346 Wis. 2d 220

c. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search

Cardwell v Lewis
94 S. Ct. 2464 (1974)
Rakas v Illinois
99 S. Ct. 1035 (1978)

16) Diminished expectation of privacy because cars are seldom residences or repositories of personal effects, and most contents in plain view

St v Johnson
187 Wis. 2d 237
(Ct. App. 1994)
St v Jones
142 Wis. 2d 570
(Ct. App. 1987)

a. Items found inside containers located in automobiles no longer require separate warrant. Scope of search defined by its object

Arizona v Gant
129 S. Ct. 1710 (2009)

b. Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest

California v Carney
105 S. Ct. 2066 (1985)
St v Durbin
170 Wis. 2d 475
(Ct. App. 1992)

c. Motor homes and camper-trailers are "automobiles" for purposes of "automobile exception," if they are operated on a highway or situated so as to indicate that they are not being used as residences

St v Field
123 Wis. 2d 466, 471
(Ct. App. 1985)

17) Knock and announce not needed for warrantless auto search

Heien v North Carolina
135 S. Ct. 530 (2014)
St v Houghton
2015 WI 79
364 Wis. 2d 234

18) If officer's suspicion is based on mistake of law, justification for a traffic stop exists, so long as mistake is reasonable

Arkansas v Sullivan
121 S. Ct. 1876 (2001)

G. Inventory Searches: Automobiles and Arrestees

South Dakota v Opperman
96 S. Ct. 3092 (1976)
St v Brooks
2020 WI 60
392 Wis. 2d 402

1) If police have lawful custody, warrantless custodial or inventory search reasonable

a. Based on administrative necessity rather than probable cause

b. Allowed in order to

- Protect owner's property
- Protect police against claims or disputes over lost or stolen property
- Protect police from potential danger

Illinois v LaFayette
103 S. Ct. 2605 (1983)

c. Jailhouse inventories of arrestee's possessions may include removal and listing of items found within closed containers, such as shoulder bags

Colorado v Bertine
107 S. Ct. 738 (1987)

d. Policies behind warrant requirement and probable cause for closed trunks and suitcases not implicated in inventory searches

Thompson v St
83 Wis. 2d 134 (1978)
St v Prober
98 Wis. 2d 345 (1980)
overruled in part by
St v Weide
155 Wis. 2d 537 (1990)

2) Search must be disinterested cataloging of contents; not designed for collection of evidence

St v Callaway
106 Wis. 2d 503 (1982)

3) Police may impound vehicle if either informed consent or reasonable police need (e.g., unattended car illegally parked, blocking traffic, abandoned car or use of car in crime and needed for retention as evidence)

St v Callaway
103 Wis. 2d 389, 401
(Ct. App. 1981)

a. State has burden to show lawful impoundment before inventory search

St v Callaway
106 Wis. 2d 503, 515–16
(1982)

b. Lawful scope of inventory search includes trunk and locked glove box of automobile

St v Prober
98 Wis. 2d 345, 355–56
(1980)

c. Sealed items found on inventory of vehicle not to be searched

Florida v Meyers
104 S. Ct. 1852 (1984)
US v Johns
105 S. Ct. 881 (1985)

d. Impounded car can be searched second time without warrant; even contents may be stored and later opened without warrant

St v Axelson
149 Wis. 2d 339
(Ct. App. 1989)

4) Delay of several days in conducting inventory search does not render it invalid

H. Community Caretaker Function

St v Matalonis
2016 WI 7
366 Wis. 2d 443
St v Blatterman
2015 WI 46
362 Wis. 2d 138

1) To decide whether seizure based on community caretaker function is reasonable, Ct must determine

a. That seizure within meaning of 4th Amendment has occurred,

b. Whether police conduct was bona fide community caretaker activity, AND

St v Maddix
2013 WI App 64
348 Wis. 2d 179
St v Ultsch
2011 WI App 17
331 Wis. 2d 242

c. Whether public need and interest outweigh intrusion upon individual privacy

Caniglia v Strom
141 S. Ct. 1596
(2021)

2) Community caretaker function never justifies a warrantless entry into a home

But see emergency aid exception, **Sec. E.**, *supra*

St v Ellenbecker
159 Wis. 2d 91
(Ct. App. 1990)

3) In a motorist assist, requesting driver's license and running status check is reasonable under 4th Amendment

St v Asboth
2017 WI 76, ¶ 27
376 Wis. 2d 644

4) In vehicle impoundment, presence or absence of or adherence to criteria governing police discretion is not dispositive

St v Brooks
2020 WI 60
392 Wis. 2d 402

5) Seizure must be lawful, even under community caretaker function, before inventory search is lawful

I. Temporary Detention/Stop and Frisk

§ 968.24
Terry v Ohio
88 S. Ct. 1868 (1968)
St v Flynn
92 Wis. 2d 427, 434
(1979)
Jones v St
70 Wis. 2d 62, 67 (1975)
St v Stout
2002 WI App 41
250 Wis. 2d 768

1) Without probable cause, police may temporarily detain and question suspect in a public place if reasonable suspicion to believe suspect involved in criminal activity

Dunaway v NY
99 S. Ct. 2248 (1979)
US v Brignoni-Ponce
95 S. Ct. 2574 (1975)

a. Detention must be brief and narrowly circumscribed

Florida v Royer
103 S. Ct. 1319 (1983)
St v Vorburger
2001 WI App 43
241 Wis. 2d 481, *rev'd*,
2002 WI 150
255 Wis. 2d 537

b. Police may not seek to verify suspicions by means that approach conditions of arrest

US v Smith
3 F3d 1088
(7th Cir 1993)

c. Handcuffing Def does not necessarily turn legal *Terry* stop into arrest

Terry v Ohio
88 S. Ct. 1868 (1968)
St v Williams
2001 WI 21
241 Wis. 2d 631
St v Waldner
206 Wis. 2d 51 (1996)

2) Adequacy of information to justify detention judged by objective standard based on specific articulable facts together with rational inferences

a. Lawful activities may provide basis for reasonable suspicion depending on cumulative effect and inferences

St v Rissley
2012 WI App 112
344 Wis. 2d 422
St v Olson
2001 WI App 284
249 Wis. 2d 391

b. Reasonable suspicion of past crime may justify traffic stop

Hayes v Florida
105 S. Ct. 1643 (1985)

c. Reasonable suspicion does not permit detention of suspect at police station to obtain fingerprints

US v Sharpe
105 S. Ct. 1568 (1985)

d. Investigative detention reasonable if investigation conducted in diligent and reasonable manner to confirm or dispel suspicions quickly

St v Gordon
2014 WI App 44
353 Wis. 2d 468

e. *Terry* stop not permitted merely because suspect, who was in a "high-crime area," momentarily patted the outside of his clothing on seeing police

St v Meddaugh
2022 WI App 12
401 Wis. 2d 134

f. Failure to stop when asked cannot be used to support reasonable suspicion if officer lacked reasonable suspicion to begin with

3) Seizure of person/flight

US v Mendenhall
100 S. Ct. 1870 (1980)
St v Washington
2005 WI App 123
284 Wis. 2d 456

a. Suspect is "seized" only when by means of force or show of authority his/her freedom of movement is restrained

St v Cundy
2023 WI App 41
409 Wis. 2d 34

b. Seizure occurs when officer standing outside doorway to home denies request of suspect within home to terminate the encounter

California v Hodari D
111 S. Ct. 1547 (1991)
St v Young
2006 WI 98
294 Wis. 2d 1

c. Suspect who does not yield to a display of authority and flees is not "seized" for 4th Amendment purposes, and evidence discarded during flight need not be suppressed

4) Informants and anonymous tips

Alabama v White
110 S. Ct. 2412 (1990)
St v Miller
2012 WI 61
341 Wis. 2d 307

a. When anonymous tipster supplies predictive information and police then verify significant aspects of that information, stop is justified

Florida v JL
120 S. Ct. 1375 (2000)

b. Anonymous tips that person is armed, without more, not sufficient to justify a stop and frisk

St v Williams
2001 WI 21
241 Wis. 2d 631

c. Anonymous tip to 9-1-1 verified only by readily observable facts is sufficient to establish reasonable suspicion for a temporary stop and frisk

St v Rutzinski
2001 WI 22
241 Wis. 2d 729
St v Patton
2006 WI App 235
297 Wis. 2d 415

St v Sisk
2001 WI App 182
247 Wis. 2d 443

d. Anonymous tip is sufficient justification for stop if tip contains sufficient indicia of informant's reliability and allegations of tip suggest that suspect poses immediate threat to public safety

e. 9-1-1 call from pay phone when caller identifies self by name is not anonymous tip

5) Technology

St v Nimmer
2022 WI 47
402 Wis. 2d 416

ShotSpotter report sufficient justification for stop if timing of response and observations at scene support reasonable suspicion suspect involved in shooting

§ 968.25
Terry v Ohio
88 S. Ct. 1861 (1968)
St v Kelsey CR
(In Int of Kelsey CR)
2001 WI 54
243 Wis. 2d 422
St v Morgan
197 Wis. 2d 200 (1995)
St v Guy
172 Wis. 2d 86 (1992)

6) In order to frisk suspect, police must have reasonable suspicion that suspect armed or dangerous, based on totality of circumstances

Illinois v Wardlow
120 S. Ct. 673 (2000)
St v Kelsey CR
(In Int of Kelsey CR)
2001 WI 54
243 Wis. 2d 422
St v Anderson
155 Wis. 2d 77 (1990)
St v Jackson
147 Wis. 2d 824 (1989)

a. Flight alone, depending on totality of circumstances, may justify investigatory stop

Adams v Williams
92 S. Ct. 1921 (1972)

b. Frisk is not evidentiary search, but done to allow officer to pursue investigation without fear of violence

St v Flynn
92 Wis. 2d 427, 435
(1979)

c. Only slight justification needed to justify pat-down for serious felony

Terry v Ohio
88 S. Ct. 1861 (1968)

d. Though scope of pat-down limited, feeling hard object justifies further inquiry

Minnesota v Dickerson
113 S. Ct. 2130 (1993)
St v Buchanan
178 Wis. 2d 441
(Ct. App. 1993)

e. If officer can develop probable cause by lawfully feeling item through clothing, it may be seized immediately

St v Triplett
2005 WI App 255
288 Wis. 2d 515

St v Johnson
2007 WI 32
299 Wis. 2d 765

St v Nesbit
2017 WI App 58, ¶ 6
378 Wis. 2d 65

f. Pat-down may include minimally invasive manipulation of clothing

g. Search may include passenger compartment of vehicle but only if reasonable suspicion exists

h. Officer may not frisk for weapons before giving person a ride without reasonable suspicion that person is armed

§ 968.24
St v Blatterman
2015 WI 46
362 Wis. 2d 138
St v Quartana
213 Wis. 2d 440
(Ct. App. 1997)

7) Temporary detention and questioning must be conducted where person stopped

Person may be moved from one location to another if within the vicinity and for a reasonable purpose

Dunaway v New York
99 S. Ct. 2248 (1979)

8) Custodial interrogation not justified on *Terry* standards

a. Probable cause required, whether or not formal arrest results

US v Rico
594 F2d 320, 326
(2d Cir 1979)

b. Investigatory stop may justify subsequent arrest, if sufficient evidence for Def's arrest rapidly develops

US v Beck
598 F2d 497, 501 n3
(9th Cir 1979)

c. But if arrest based on less than probable cause, redesignating it as investigatory stop will not save it

US v Place
103 S. Ct. 2637 (1983)

9) Temporary detention of luggage

a. Upon reasonable suspicion, police may temporarily detain luggage for limited investigation

b. 90-minute detention exceeds permissible scope

US v Borys
766 F2d 304
(7th Cir 1985)

c. 75-minute detention at airport to await narcotics dog not unreasonable

10) Temporary traffic stops

Delaware v Prouse
99 S. Ct. 1391 (1979)

a. Even brief stop of car is seizure and must be judged by objective standard of reasonableness

Whren v US
116 S. Ct. 1769 (1996)
St v Griffith
2000 WI 72
236 Wis. 2d 48
St v Harris
206 Wis. 2d 243 (1996)

b. Stop of vehicle is also seizure of all occupants

St v Griffin
183 Wis. 2d 327
(Ct. App. 1994)

c. Random stops not permitted; officer must demonstrate articulable suspicion that driver unlicensed or violating traffic law

St v Lord
2006 WI 122
297 Wis. 2d 592

d. Officer cannot infer wrongful conduct based solely on display of a temporary license plate

11) Checkpoints

§ 349.02(2)
City of Indianapolis v Edmond
121 S. Ct. 447 (2000)

a. Highway checkpoint program under which police, without individualized suspicion, stop vehicles for primary purpose of discovering drugs violates 4th Amendment

St v Scott
2017 WI App 74
378 Wis. 2d 578

b. Roadblock that went beyond ordinary crime control and was appropriately tailored to apprehend suspect who was likely to flee by way of particular route did not violate 4th Amendment

- Factors to determine reasonableness of checkpoint-type stop are gravity of the public concerns served by the seizure, degree to which the seizure advances the public interest, and severity of the interference with individual liberty

Alabama v White
110 S. Ct. 2412 (1990)
St v Williams
2001 WI 21
241 Wis. 2d 631

12) Stop is permitted based on anonymous tip if facts show sufficient indicia of reliability, corroborated by independent police work to support a reasonable suspicion

California v Hodari D
111 S. Ct. 1547 (1991)
Cty of Grant v Vogt
2014 WI 76, ¶ 25
356 Wis. 2d 343

13) Seizure does not occur so long as reasonable person would feel free to disregard police and go about his/her business

J. School Searches

New Jersey v TLO
105 S. Ct. 733 (1985)

1) School search is legal when

a. It is justified at its inception, and

b. It is reasonably related in scope to the circumstances that justified the intrusion in the first place

LL v Circuit Ct (In Int of LL)
90 Wis. 2d 585
(Ct. App. 1979)

2) 4th Amendment applies but

a. Doctrine of *in loco parentis* lowers standard applied in determining reasonableness

b. Articulable basis for search required

St v Angelia DB (In Int of Angelia DB)
211 Wis. 2d 140 (1997)

3) Lesser standard of "reasonable grounds" applies to search conducted on school grounds by police officer done at request of school authorities

St v Schloegel
2009 WI App 85
319 Wis. 2d 741

4) School "grounds" includes school parking lot

St v Vang
2021 WI App 28
398 Wis. 2d 311

5) Non-students on school grounds also subject to search

K. Probation/Parole/Extended Supervision (persons on supervision)

US v Knights
122 S. Ct. 587 (2001)
St v Hajicek
2001 WI 3
240 Wis. 2d 349
St v Griffin
131 Wis. 2d 41, 46 (1986)

1) Agent may search home of person on supervision with reasonable grounds to suspect contraband (probable cause not needed)

St v West
185 Wis. 2d 68 (1994)

2) Search may be conducted over explicit objections of those living with person on supervision as permission to conduct searches is treated as if person had given actual and present consent

St v Wheat
2002 WI App 153
256 Wis. 2d 270

3) Reasonable search is lawful even if agent relies, in part, on information from police in violation of the 4th Amendment

St v Purtell
2014 WI 101
358 Wis. 2d 212
St v Keller
2017 WI App 19
374 Wis. 2d 325

4) Warrantless search of computer of a person on supervision permissible by agent or police expert if agent has reasonable grounds to believe computer contains contraband

§ 302.113(7r)
St v Anderson
2019 WI 97
389 Wis. 2d 106

L. Law Enforcement Search of Person on Supervision

Law enforcement officer may search person, residence, and any property at any time during period of supervision

1) If officer knows person is under supervision status, and

2) Under totality of the circumstances, officer reasonably suspects that person is committing, is about to commit, or has committed a crime, or a violation of a condition of extended supervision

3) Search must be conducted in a reasonable manner

4) Search may not be arbitrary, capricious, or harassing

5) Officer shall, as soon as practicable after search, notify DOC

M. Administrative Inspection

Donovan v Dewey
101 S. Ct. 2534 (1981)
St v Mendoza
220 Wis. 2d 803
(Ct. App. 1998)
rev'd on other grounds
227 Wis. 2d 838 (1999)
Lundeen v Dept of Agric
189 Wis. 2d 255
(Ct. App. 1994)

1) Reasonable without warrant as long as

a. Inspection relates to governmental scheme that furthers a substantial governmental interest

b. Inspection necessary to further the governmental scheme

c. Inspection scheme must be certain and regular in its application

Whren v US
116 S. Ct. 1769 (1996)
St v Mendoza
220 Wis. 2d 803
(Ct. App. 1998)
rev'd on other grounds
227 Wis. 2d 838 (1999)

2) Administrative inspections, unlike traffic stops, are not reasonable if conducted as a pretext to obtain evidence of other criminal violations

St v Jackowski
2001 WI App 187
247 Wis. 2d 430

3) Suppression not available as remedy for mere statutory violation in issuance of inspection warrant when police acted in good faith in executing warrant

N. Other Exceptions

1) Bank records

St v Hoffman
106 Wis. 2d 185, 215
(Ct. App. 1982)

a. Open question as to whether warrant required

St v Swift
173 Wis. 2d 870
(Ct. App. 1993)

b. Bank records obtained by subpoena of third party not suppressible

St v Monosso
103 Wis. 2d 368
(Ct. App. 1981)

2) Fire officials entitled to inspect fire scene to determine cause of fire, including those areas not directly affected by fire

Maryland v Macon
105 S. Ct. 2778 (1985)

3) Pornography: purchase of obscene magazines from adult bookstore not a seizure

4) Buses (Drug interdiction)

Florida v Bostick
111 S. Ct. 2382 (1991)

a. Officers may approach passengers at random to ask questions and request consent so long as reasonable person would feel free to decline

US v Drayton
122 S. Ct. 2105 (2002)

b. Boarding of bus at rest stop did not constitute seizure or otherwise invalidate subsequent, consensual searches

5) OWI Blood Draw—See **TR 1, Sec. 12**

St v Parisi
2016 WI 10
367 Wis. 2d 1

6) Warrantless blood draw to collect evidence of heroin ingestion may be justified by exigent circumstances

CR 20
SUPPRESSION—IDENTIFICATION

1. General ..... CR 20-3
2. Right to Counsel ..... CR 20-3
3. Procedure on Suppression Motion ..... CR 20-4
4. One-on-One Show-Ups ..... CR 20-7
5. Other Identification ..... CR 20-8
6. Jury Instruction ..... CR 20-8

1. General

Simmons v US
88 SCt 967 (1968)
Stovall v Denno
87 SCt 1967 (1967)

A. Def has due-process right not to be subject to unnecessarily suggestive identification procedure

US v Wade
87 SCt 1926 (1967)

B. Concern is that influence of improper suggestions upon identifying witnesses causes serious miscarriage of justice

Manson v Braithwaite
97 SCt 2243 (1977)

C. Societal interests in fair identification procedures include

1) Deterring improper police practices

2) Furthering administration of justice

3) Keeping unreliable evidence from jury

2. Right to Counsel

Simos v St
83 Wis. 2d 251, 254
(1978)

A. 6th Amendment right to counsel issues must be treated separately from due-process considerations of suggestiveness

US v Wade
87 SCt 1926 (1967)

B. Post-indictment lineup is critical stage of proceedings requiring assistance of Atty to avert unfairness at trial and to allow proper confrontation

1) Sanction for failure to provide Atty is suppression of in-Ct identification, unless State can establish independent source by clear and convincing evidence

Wright v St
46 Wis. 2d 75, 85 (1970)

2) Substitute Atty may be given to Def to expedite identification procedure since no requirement that same Atty represent Def at trial

Kirby v Illinois
92 SCt 1877 (1972)

C. Right to counsel does not apply if

St v Taylor
60 Wis. 2d 506, 521–22 (1973)
US ex rel Hall v Lane
804 F2d 79
(7th Cir 1986)

1) Lineup occurs before subject charged

2) Suspect makes voluntary, intelligent waiver of right to Atty

3) One-on-one show-up

4) Photographic identification

3. Procedure on Suppression Motion

971.31(2), (5)

A. Issue of admissibility must be raised by pretrial motion and heard outside presence of jury in pretrial hearing

St v Cole
50 Wis. 2d 449, 460 (1971)

1) If issue arises for first time on cross-examination, Def may request hearing outside presence of jury

908.01(4)(a)3.
911.01(4)(a)

2) Hearsay admissible at hearing challenging identification

901.04(4)
Harris v New York
91 SCt 643 (1971)
Simmons v US
88 SCt 967 (1968)

3) Def may testify without being cross-examined on other subjects or allowing State to use testimony in case-in-chief except for impeachment purposes

St v Marshall
92 Wis. 2d 101, 117–18
(1979)
US v Thevis
665 F2d 616
(5th Cir 1982)

B. Suppression applies only to intentional police procedures, not to inadvertent procedures

Watkins v Sowders
101 SCt 654 (1981)

C. Def not automatically entitled to an evidentiary hearing whenever ID admissibility is challenged

St v Garner
207 Wis. 2d 520
(Ct. App. 1996)

1) Def must show a reasonable possibility that hearing will establish a factual basis for Def to prevail

2) But Def is not entitled to hearing simply to search or as a discovery tool

D. Lineups and photographic identification

St v Roberson
2006 WI 80, ¶ 34,
292 Wis. 2d 280
St v Nawrocki
2008 WI App 23
308 Wis. 2d 227

1) In-Ct identification admissible regardless of suppressed out-of-Ct identification, if the identification is based on an independent recollection sufficiently distinguishable to purge the primary taint

St v Armstrong
110 Wis. 2d 555, 577
(1983)
Powell v St
86 Wis. 2d 51, 65 (1978)

2) Def has initial burden to show identification unnecessarily suggestive

a. Factors bearing on suggestiveness

- Statements made to victim or photographs shown
- Relative dissimilarity in appearance
  - — Height, weight, hair, race, glasses, clothing, scars
- Dissimilarity in presentation of suspects
- Ease with which suggestiveness could have been avoided
- Interaction between multiple victims, although serial presentation not per se suggestive

- Aspects of procedure/photos that unduly emphasize Def

St v Mosley
102 Wis. 2d 636, 652
(1981)
Fells v St
65 Wis. 2d 525 (1974)

b. If Def fails to show suggestiveness, State need not show reliability

St v Mosley
102 Wis. 2d 636, 652
(1981)

3) If identification was unnecessarily suggestive, burden shifts to State to show by clear and convincing evidence that out-of-Ct identification was reliable

Neil v Biggers
93 SCt 375 (1972)
Powell v St
86 Wis. 2d 51, 64–65
(1978)

a. Reliability determined by totality of circumstances test

Neil v Biggers
93 SCt 375 (1972)
Powell v St
86 Wis. 2d 51, 65 (1978)

b. Factors bearing on reliability

- Opportunity of victim to view suspect at time of crime
- Witness's degree of attention
- Accuracy of prior description
- Failure to identify Def on prior occasion
- Level of certainty at identification
- Lapse of time between identification and crime
- Any prior identification of person other than Def

St v McMorris
213 Wis. 2d 156 (1997)

4) If identification inadmissible, burden shifts to State to show by clear and convincing evidence that in-Ct identification was from independent source

US v Wade
87 SCt 1926 (1967)
Holmes v St
59 Wis. 2d 488, 498–99
(1973)

a. Factors bearing on independent source of identification

- Witness's opportunity to observe criminal act and degree of attention
- Discrepancy between pre-lineup description and Def's actual appearance
- Any identification of Def by photo before lineup
- Failure to identify Def on prior occasion
- Level of certainty as to identification
- Lapse of time between identification and crime
- Any prior identification of person other than Def

St v Ledger
175 Wis. 2d 116
(Ct. App. 1993)

5) Voice lineup governed by same standard

4. One-on-One Show-Ups

St v Roberson
2019 WI 102
389 Wis. 2d 190

A. Def has burden that procedure employed was impermissibly suggestive

B. If Def meets burden, State must show identification was reliable under totality of circumstances

C. Show-up not necessary unless police:

1) Lacked probable cause to arrest, or

2) Due to other exigent circumstances, could not conduct lineup or photo array

Stovall v Denno
87 SCt 1967 (1967)

D. May be necessitated by time constraints or emergency

1) Should only be used within 24 hours after crime when lineup not otherwise available

Johnson v St
47 Wis. 2d 13, 18–19
(1970)

2) Policy factors supporting one-on-one show-up

a. Added reliability because of nearness in time

b. Allows expeditious release of innocent suspect

St v Hibl
2006 WI 52
290 Wis. 2d 595

E. Not inherently suggestive and inadmissible when identification is spontaneous or accidental. Ct must serve as gatekeeper and employ § 904.03 analysis

5. Other Identification

St v Stinson
134 Wis. 2d 224
(Ct. App. 1986)

A. Bite mark evidence can be admissible on issue of identity

St v Ledger
175 Wis. 2d 116
(Ct. App. 1993)

B. Voice exemplars not impermissibly suggestive

6. Jury Instruction

US v Telfaire,
469 F2d 552, 558
(DC Cir 1972)

A. When identification is major issue, should give special instruction to jury

1) Model instruction set forth in *Telfaire*

2) Wis JI-Cr 141 is modified Wis instruction incorporating some elements of *Telfaire*

CR 21: SUPPRESSION—CONFESSIONS/WITNESS STATEMENTS

1. Suppression Motion Procedure ..... CR 21-1
2. Voluntariness Standards Generally ..... CR 21-4
3. Involuntary Confessions—Police Tactics ..... CR 21-5
4. Involuntary Confessions—Suspect's Personal Characteristics ..... CR 21-8
5. Involuntary Statements of Witnesses, Not Suspects ..... CR 21-9
6. *Miranda* Rights Generally ..... CR 21-9
7. *Miranda* Rights Inapplicable—Suspect Not in Custody ..... CR 21-11
8. *Miranda* Rights Inapplicable—Suspect Not Being Interrogated ..... CR 21-15
9. Determining Whether Suspect Effectively Invoked *Miranda* Rights ..... CR 21-16
10. Other Grounds for Suppression ..... CR 21-20

1. Suppression Motion Procedure

§ 971.31(3), (4)
Miranda v Arizona
86 SCt 1602 (1966)
St v Jerrell CJ (In Int of Jerrell CJ)
2005 WI 105
283 Wis. 2d 145

A. Def may challenge both voluntariness and compliance with 6th Amendment and with *Miranda* and *Jerrell* by pretrial motion or objection at trial

1) Recommendation

a. Resolve issues at pretrial hearing to avoid jury delay, provide opportunity for research, and aid in settlement of case

Roney v St
44 Wis. 2d 522, 535 (1969)
Bradley v St
36 Wis. 2d 345 (1967)

St v Monje
109 Wis. 2d 138, 149–50 (1982)

b. If Def chooses not to object to admission of statement, take affirmative waiver from Def and counsel

§ 971.23(1)
St ex rel Goodchild v Burkefe
27 Wis. 2d 244, 264 (1965)

2) Prosecutor has obligation, when practical, to notify Def within reasonable time before trial of any confessions or admissions to be offered at trial

Roney v St
44 Wis. 2d 522, 535 (1969)

3) If Def establishes surprise at existence of statements at trial, delay may be required to prepare for hearing

St v Monje
109 Wis. 2d 138, 149–50
(1982)

4) Def's right to challenge confessions or admissions may be waived, unless

   a. Def requests *Miranda/Goodchild/Jerrell* hearing (even at trial), and

   b. Def gives specific objections to certain statements

   c. However, reversible error if Judge fails to conduct *Goodchild* hearing before Def's statement introduced

§ 938.31(3)
St v Jerrell CJ
(In Int of Jerrell CJ)
2005 WI 105
283 Wis. 2d 145

5) Juv Def may seek to suppress statements made without at least audiotape recording

B. Hearing

1) Procedure

St v Echols
175 Wis. 2d 653 (1993)
Wold v St
57 Wis. 2d 344 (1973)

   a. Both voluntariness and *Miranda* issues may be heard at same hearing, but separate findings of fact and conclusions of law should be made on record for each issue

§ 971.31(3)
Pinczkowski v St
51 Wis. 2d 249, 255
(1971)
McKinley v St
37 Wis. 2d 26 (1967)

   b. Hearing must be held outside presence of jury

St v Miller
35 Wis. 2d 454 (1967)

   c. Scope within discretion of Ct

Roney v St
44 Wis. 2d 522, 533
(1969)

      - Not to be converted into pretrial discovery proceeding
      - Weight and credibility of statement not in issue at hearing

Lee v Illinois
106 SCt 2056 (1986)

      - Truth or falsity of statement not relevant

St v Zamzow
2017 WI 29, ¶ 24
374 Wis. 2d 220

   d. Right of confrontation does not apply during pretrial proceedings

Colorado v Connelly
107 SCt 515 (1986)

2) State must, by preponderance of the evidence (greater weight of the credible evidence):

St v Santiago
206 Wis. 2d 3 (1996)
St v Jones
192 Wis. 2d 78 (1995)

a. Show compliance with *Miranda*, including issues of custody, interrogation, and Def's understanding and waiver of rights

St v Agnello
226 Wis. 2d 164 (1999)

b. Demonstrate voluntariness—lack of police coercion

St v Samuel
2002 WI 34
252 Wis. 2d 26

- Standard of preponderance of evidence also applies to state's burden of proving a witness's statement was voluntary

St v Jiles
2003 WI 66
262 Wis. 2d 457

NOTE: Unsworn police reports alone are generally not sufficient to meet burden.

C. Use of statements at trial

Harris v New York
91 SCt 643 (1971)
St v Franklin
228 Wis. 2d 408
(Ct. App. 1999)

1) Statements taken in violation of *Miranda* and *Edwards* are suppressed from State's case-in-chief

St v Garcia
2020 WI App 71
394 Wis. 2d 743
aff'd by equally divided ct
2021 WI 76
399 Wis. 2d 324

Voluntary suppressed statements may be used only for impeachment of Def and only if Def testifies

Upchurch v St
64 Wis. 2d 553 (1974)

2) Involuntary statements may not be used for any purpose

Kutchera v St
69 Wis. 2d 534, 546
(1975)

3) Written confession need not be signed by Def to be admissible

St v Jensen
147 Wis. 2d 240 (1988)

4) Written or recorded confession admitted into evidence treated like any other exhibit in determining whether it should be sent to jury room

St v Schultz
152 Wis. 2d 408 (1989)

5) Def's testimony at *Goodchild* hearing may be used to impeach trial testimony

St v Lindh
161 Wis. 2d 324 (1991)

6) Compliance with *Miranda* need not be shown to use Def's statements to psychiatrist in insanity phase of trial

St v Johnson
193 Wis. 2d 382
(Ct. App. 1995)

7) Postpolygraph interview, distinct from polygraph, may be admitted in case-in-chief. For further discussion, see **CR 28, Polygraph, Sec. 3.A.**

St v Dobbs
2020 WI 64, ¶¶ 52, 68
392 Wis. 2d 505

8) Admission at trial of statements made in violation of *Miranda* is subject to harmless-error analysis

2. Voluntariness Standards Generally

A. Background

Brown v Mississippi
56 SCt 461 (1936)

1) Constitutional considerations

   a. 5th and 14th Amendment due process

   b. 5th Amendment protection against self-incrimination, and

   c. 6th Amendment right to counsel

      • Attaches only to charged offenses

Texas v Cobb
121 SCt 1335 (2001)

Colorado v Connelly
107 SCt 515 (1986)

2) Sole concern of 5th Amendment is governmental coercion; coercive activity by private party does not render confession inadmissible

St v Agnello
226 Wis. 2d 164 (1999)
Lang v St
178 Wis. 114 (1922)

3) Truthfulness of confession not relevant and plays no role in determining whether confession was voluntary

B. Standards to be applied

Lynumn v Illinois
83 SCt 917 (1963)
St v Ward
2009 WI 60
318 Wis. 2d 301
St v Hunt
53 Wis. 2d 734, 740
(1972)

1) Ultimate question is whether confession was voluntary product of free and unconstrained will, reflecting deliberateness of choice, and not coerced or product of improper police pressure

St v Lemoine
2013 WI 5
345 Wis. 2d 171
St v Hoppe
2003 WI 43
261 Wis. 2d 294
St v Clappes
136 Wis. 2d 222 (1987)

2) "Totality of circumstances" test balances personal characteristics of Def against police pressures applied

Phillips v St
29 Wis. 2d 521, 530 (1966)

3) Line between coercion and voluntariness hard to draw, so use sense of fairness and justice to find "in totality of circumstances"

St v Hoyt
21 Wis. 2d 310 (1963)

4) When police have substantial evidence of Def's guilt when interrogation begins, resolve ambiguities in favor of suppression

Arizona v Fulminante
111 SCt 1246 (1991)
Colorado v Connelly
107 SCt 515 (1986)
St v Clappes
136 Wis. 2d 222, 241 (1987)

5) Primary concern is coercive government activity. Finding of involuntariness requires evidence of improper police practice deliberately used to obtain confession

6) Focus on any impairment of Def's mental freedom

St v Hoyt
21 Wis. 2d 284 (1964)

a. Attempt should be made to recreate Def's psychological response to circumstances and apply to legal standards

St v Wedgeworth
100 Wis. 2d 514, 525–26 (1981)
Crummel v St
46 Wis. 2d 348 (1970)

b. That Def spoke imprudently or out of remorse and later regrets making statement does not vitiate otherwise voluntary statement

Blaszke v St
69 Wis. 2d 81, 89–91 (1975)

c. Self-imposed internal coercion not basis for finding involuntariness

St v Albrecht
184 Wis. 2d 287 (Ct. App. 1994)
St v Drogsvold
104 Wis. 2d 247, 274 (Ct. App. 1981)

d. Statement not rendered involuntary by fact that Def seeking benefit through confession

3. Involuntary Confessions—Police Tactics

A. Length of time Def in custody and delay before arraignment

Rawlings v Kentucky
100 SCt 2556 (1980)
Reck v Pate
81 SCt 1541 (1961)
Wagner v St
89 Wis. 2d 70 (1979)

1) Long detentions looked on with disfavor and may result in exclusion; purpose and nature of detention are significant

St v Herrington
41 Wis. 2d 757 (1969)
Phillips v St
29 Wis. 2d 521 (1966)

St v Hunt
53 Wis. 2d 734, 745
(1972)
Phillips v St
29 Wis. 2d 521, 535
(1966)
St v Whitman
160 Wis. 2d 260
(Ct. App. 1991)

B. Allowing Def outside communication

Arizona v Fulminante
111 SCt 1246, 1253
(1991)

C. Threats to Def

St v Deets
187 Wis. 2d 630
(Ct. App. 1994)

1) But mere expression of skepticism is not coercive

St v Brockdorf
2006 WI 76
291 Wis. 2d 635

2) Statements given under threat of discharge from public employment may be deemed compelled

St v Clappes
136 Wis. 2d 222, 239
(1987)
Phillips v St
29 Wis. 2d 521, 530
(1966)

D. Relays of investigators

Bradley v St
36 Wis. 2d 345 (1967)
Woods v Clusen
794 F2d 293
(7th Cir 1986)

E. Showing Def victims of crime

Culombe v Connecticut
81 SCt 1860 (1961)
St v La Fernier
37 Wis. 2d 365 (1967)

F. Psychological coercion inherent in custodial interrogation

St v Hockings
86 Wis. 2d 709 (1979)
St v Verhasselt
83 Wis. 2d 647 (1978)

G. Giving *Miranda* warnings to custodial Def

Hill v St
91 Wis. 2d 315
(Ct. App. 1978)

H. Physical abuse

Turner v St
76 Wis. 2d 1 (1977)
Pontow v St
58 Wis. 2d 135, 139
(1973)
St v Nicholson
187 Wis. 2d 688
(Ct. App. 1994)
St v Deets
187 Wis. 2d 630
(Ct. App. 1994)
St v Edwardsen
135 Wis. 2d 208
(Ct. App. 1986)

I. Promise of leniency

1) Admissible if result of confession bargain

2) Inadmissible if result of plea bargain (§ 904.10)

3) Inadmissible if police promise leniency, but police can explain that cooperation will benefit Def

St v Reynolds
2010 WI App 56
324 Wis. 2d 385

J. Length of interrogation

Fay v Noia
83 SCt 822 (1963)

K. General conditions under which interrogation took place

St v Schlise
86 Wis. 2d 26 (1978)

L. Prior coerced confessions

Brewer v Williams
97 SCt 1232 (1977)

M. Police stratagems

Turner v St
76 Wis. 2d 1 (1977)

N. Confronting Def with evidence against him or her

St v Triggs
2003 WI App 91
264 Wis. 2d 861
St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

O. Deceit or misrepresentation

St v Reynolds
2010 WI App 56, ¶ 50
324 Wis. 2d 385

P. Appeals to suspect's conscience

St v Vice
2021 WI 63
397 Wis. 2d 682

Q. Referring to and confronting Def with polygraph test results during interrogation

4. Involuntary Confessions—Suspect's Personal Characteristics

Phillips v St
29 Wis. 2d 521 (1966)

A. Need for water and nourishment

St v Wallace
59 Wis. 2d 66, 81 (1973)
Renner v St
39 Wis. 2d 631, 636 (1968)
St v Williams
220 Wis. 2d 458 (Ct. App. 1998)

B. Physical and emotional condition

St v Clappes
136 Wis. 2d 222 (1987)
St v Bullock
2014 WI App 29
353 Wis. 2d 202

1) Mere existence of physical pain or intoxication insufficient to render statement involuntary

St v Hunt
53 Wis. 2d 734 (1972)

2) Deprivation of sleep

St v Bergenthal
47 Wis. 2d 668, 679 (1970)
St v Shaffer
96 Wis. 2d 531 (Ct. App. 1980)

3) Drunkenness

St v Hoppe
2003 WI 43
261 Wis. 2d 294

4) Alcohol withdrawal and withholding of medication to deal with tremors may be relevant, along with length of interviews and lack of *Miranda* warnings

C. Age, education, intelligence, and understanding of Def

St v Moore
2015 WI 54
363 Wis. 2d 376
St v Verhasselt
83 Wis. 2d 647 (1978)
St v Cumber
130 Wis. 2d 327 (Ct. App. 1986)

St v Moore
2015 WI 54, ¶¶ 57–61
363 Wis. 2d 376

1) The younger the Def, the more carefully the Ct must scrutinize the confession, but the confession of a 15 year old with considerable experience with police custody is not involuntary merely because of the Def's age or below-average intellect

Lynumn v Illinois
83 SCt 917 (1963)
St v Hoppe
2003 WI 43, ¶ 39
261 Wis. 2d 294

D. Previous experience with police

St v Owens
148 Wis. 2d 922 (1989)

E. Def's subjective belief in promises made not dispositive

St v Hockings
86 Wis. 2d 709 (1979)

F. Whether Def received *Miranda* warnings

5. Involuntary Statements of Witnesses, Not Suspects

St v Samuel
2002 WI 34
252 Wis. 2d 26

A. Def may seek to suppress allegedly involuntary statement of witness to police. Involuntariness of witness statement requires:

1) Egregious police conduct,

2) Witness statement that is unreliable as matter of law, and

3) Involuntariness under totality of circumstances

6. *Miranda* Rights Generally

Miranda v Arizona
86 SCt 1602 (1966)
St v Mitchell
167 Wis. 2d 672 (1992)

A. Warnings necessary to help accused overcome inherent pressures of custodial interrogation atmosphere

B. Two key questions

1) Was Def in custody?

2) Was Def interrogated?

3) If answer to both questions is yes, *Miranda* requirement must be satisfied

C. Sufficiency of *Miranda* Warnings

Jones v St
69 Wis. 2d 337, 343–44
(1975)
St v Backstrom
2006 WI App 114
293 Wis. 2d 809

1) Substance, not form controls

California v Prysock
101 SCt 2806 (1981)
St v Fillyaw
104 Wis. 2d 700 (1981)

2) Warnings need not follow ritualistic formula repeated without variation

St v Santiago
206 Wis. 2d 3 (1996)
St v Hindsley
2000 WI App 130
237 Wis. 2d 358

3) Special consideration and attention should be given to non-English-speaking or deaf Def, including preserving *Miranda* warning in foreign language and possible need for multiple interpreters to meet particular needs of Def

Florida v Powell
130 SCt 1195 (2010)

4) Standard warnings are adequate even though they do not explicitly state that suspect has the right to have counsel present during questioning

St v Jackson
229 Wis. 2d 328
(Ct. App. 1999)

5) Can tell indigent Def that Atty will be appointed once charged with crime or at trial, so long as told no need to say anything until Atty appointed and interrogation terminated unless reinitiated by Def with waiver of counsel

St v Mitchell
167 Wis. 2d 672 (1992)
McClellan v St
53 Wis. 2d 724, 730
(1972)

6) Right to terminate questioning or consult with Atty at any time during interrogation is mandatory procedural requirement, but no warning required

D. Waiver of *Miranda* rights

Miranda v Arizona
86 SCt 1602 (1966)

St v Santiago
206 Wis. 2d 3 (1996)
St v Jones
192 Wis. 2d 78 (1995)
St v Reiholec
2021 WI App 45, ¶ 19
398 Wis. 2d 729

1) State must show by preponderance of evidence that Def was adequately informed of *Miranda* rights, including privilege against self-incrimination and right to counsel, and that Def knowingly, voluntarily, and intelligently waived them

Schultz v St
82 Wis. 2d 737, 748
(1978)

2) State makes prima facie showing of valid waiver by demonstrating Def has been told or read rights, indicates understanding, and is willing to make statement

Berghuis v Thompkins
130 SCt 2250 (2010)

Miranda v Arizona
86 SCt 1602, 1628
(1966)

3) Waiver may be express or implied

   a. No implied waiver simply from silence after warnings given or fact that confession eventually obtained

   b. Silence, understanding of rights, and conduct consistent with waiver may support finding of intelligent and understanding waiver of rights by Def

N Carolina v Butler
99 SCt 1755 (1979)
Jordan v St
93 Wis. 2d 449, 465
(1980)
Woods v Clusen
794 F2d 293
(7th Cir 1986)

St v Reiholec
2021 WI App 45, ¶ 31
398 Wis. 2d 729

4) Evidence that State misled Def as to rights will invalidate waiver

Miranda v Arizona
86 SCt 1602, 1629
(1966)

5) Evidence that Def was threatened, tricked, or cajoled will invalidate waiver

St v Schilling
86 Wis. 2d 69, 86 (1978)

6) Def's misapprehension of the law does not vitiate otherwise-valid waiver

St v Beaver
181 Wis. 2d 959
(Ct. App. 1994)

7) Intoxication of Def does not per se vitiate an otherwise-valid waiver

7. *Miranda* Rights Inapplicable—Suspect Not in Custody

Stansbury v California
114 SCt 1526 (1994)
Miranda v Arizona
86 SCt 1602 (1966)
St v Bartelt
2018 WI 16, ¶ 31
379 Wis. 2d 588
St v Hassel
2005 WI App 80
280 Wis. 2d 637

A. *Miranda* applies after person taken into custody or otherwise deprived of freedom of action in any significant way (of degree associated with formal arrest)

Berkemer v McCarty
104 SCt 3138 (1984)
St v Uhlenberg
2013 WI App 59
348 Wis. 2d 44

B. Test is objective, reasonable person analysis, from viewpoint of suspect, not subjective test

St v Koput
142 Wis. 2d 370 (1988)
St v Mosher
221 Wis. 2d 203
(Ct. App. 1998)

1) Police officer's plan to arrest, or possession of arrest warrant, if not communicated to suspect, has no bearing on question of "custody" or reasonable person analysis

St v Quigley
2016 WI App 53, ¶ 42
370 Wis. 2d 702

2) Suspect's non-objective belief that a probation hold will be placed after questioning is irrelevant

C. Circumstances suggesting suspect is in custody

St v Gruen
218 Wis. 2d 581, 594
(Ct. App. 1998)

1) Suspect is not free to leave

St v Quigley
2016 WI App 53, ¶ 38
370 Wis. 2d 702

2) Suspect is questioned about suspected crimes

Beckwith v US
96 SCt 1612 (1976)
St v Bartelt
2018 WI 16, ¶ 44
379 Wis. 2d 588

a. That suspect is focus of investigation and is confronted with incriminating evidence is not dispositive

St v Bartelt
2018 WI 16, ¶ 53
379 Wis. 2d 588

b. Confessing to the crime does not necessarily transform a noncustodial interrogation into a custodial interrogation

St v Kilgore
2016 WI App 47, ¶¶ 21–34, 370 Wis. 2d 198
St v Goetz
2001 WI App 294, ¶¶ 12–17, 249 Wis. 2d 380

c. Occupant detained on premises during execution of search warrant may or may not be in custody

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

3) Suspect is patted down before questioning

St v Morgan
2002 WI App 124, ¶¶ 12, 18, 254 Wis. 2d 602

4) Suspect is outnumbered by officers

St v Morgan
2002 WI App 124, ¶¶ 12, 17, 254 Wis. 2d 602

5) Officer's gun is drawn

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

6) Suspect is transported to interview room in locked police vehicle

St v Halverson
2021 WI 7, ¶ 30
395 Wis. 2d 385

7) Suspect is handcuffed

St v Dobbs
2020 WI 64, ¶ 63
392 Wis. 2d 505

8) Length of questioning is longer than 30 minutes

D. Circumstances suggesting suspect is not in custody

Berkemer v McCarty
104 SCt 3138, 3150
(1984)
St v Martin
2012 WI 96
343 Wis. 2d 278
St v Gruen
218 Wis. 2d 581
(Ct. App. 1998)
Village of Menomonee Falls v Kunz
126 Wis. 2d 143, 149–51
(Ct. App. 1985)

1) General on-the-scene questioning, or during *Terry* stop or traffic stop, or questioning to determine need for assistance

St v Quigley
2016 WI App 53, ¶ 40
370 Wis. 2d 702

2) Police tell suspect he or she is not under arrest or is free to leave; this factor is "one of the most important"

St v Quigley
2016 WI App 53, ¶ 41
370 Wis. 2d 702

3) Suspect understands he or she is not under arrest; this factor is "highly significant"

Oregon v Mathiason
97 SCt 711, 713–14
(1977)
St v Bartelt
2018 WI 16, ¶ 38,
379 Wis. 2d 588

4) Suspect comes to police station voluntarily

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

5) Suspect agrees to speak with police

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

6) Suspect is not restrained

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

7) Interview room unlocked

St v Farias-Mendoza
2006 WI App 134 ,¶ 23
294 Wis. 2d 726

a. Suspect considered in custody if left in a locked room for a long time, even if not aware room is locked

St v Quigley
2016 WI App 53, ¶ 38
370 Wis. 2d 702

8) Tone of questioning not confrontational or accusatory

St v Quigley
2016 WI App 53, ¶ 38
370 Wis. 2d 702

9) Questioning not lengthy

Oregon v Mathiason
97 SCt 711, 714 (1977)

10) Suspect allowed to leave after questioning

St v Bartelt
2018 WI 16, ¶ 38
379 Wis. 2d 588

11) Suspect is permitted to answer and check his or her phone during interview

Howes v Fields
132 SCt 1181(2012)
St v Halverson
2021 WI 7, ¶ 4
395 Wis. 2d 385

E. Suspect already incarcerated on another charge is not per se in custody for *Miranda* purposes; Ct must analyze totality of circumstances described above in Secs. 7.C. & 7.D.

South Dakota v Neville
103 SCt 916 (1983)

F. Warnings not required before request to take blood alcohol test

St v Knapp,
111 Wis. 2d 380, 385–88
(Ct. App. 1983)

G. Warnings not required for PSI, provided investigation not accusatorial in nature

H. Hospital questioning

St v Torkelson
2007 WI App 272
306 Wis. 2d 673

1) Not in custody while unrestrained during short wait for ambulance

St v Clappes
117 Wis. 2d 277 (1984)
St v Schambow
176 Wis. 2d 286
(Ct. App. 1993)

2) Not in custody while doctors treating

Scales v St
64 Wis. 2d 485 (1974)
St v Buck
210 Wis. 2d 115
(Ct. App. 1997)

3) In custody following arrest at scene of crime, in ambulance or in hospital

St v Schloegel
2009 WI App 85
319 Wis. 2d 741

I. Warnings not required for questioning of student at school by school officials if school liaison officer is merely present

St v Hanson
2019 WI 63
387 Wis. 2d 233

J. Warnings not required for questioning of witness at John Doe proceeding (but John Doe Judge should address witness in accordance with Wis JI-Cr SM-12, which advises witness of right against self-incrimination and right to consult counsel—*See* CR 48, John Doe Proceedings, Sec. 2.E.)

New York v Quarles
104 SCt 2626 (1984)

K. Public safety exception

St v Uhlenberg
2013 WI App 59
348 Wis. 2d 44
St v Stearns
178 Wis. 2d 845
(Ct. App. 1993)

1) *Miranda* does not apply to questions necessary to secure officer's safety or safety of public or Def, as opposed to questions designed to elicit testimonial evidence

St v Grady
2009 WI 47
317 Wis. 2d 344

L. Warnings given during noncustodial interrogation need not be repeated when interrogation becomes custodial

8. *Miranda* Rights Inapplicable—Suspect Not Being Interrogated

Rhode Island v Innis
100 SCt 1682 (1980)
St v Hambly
2008 WI 10
307 Wis. 2d 98
St v Douglas
2013 WI App 52
347 Wis. 2d 407
St v Morgan
2002 WI App 124
254 Wis. 2d 602
St v Badker
2001 WI App 27
240 Wis. 2d 460

A. Interrogation not limited to express questioning of Def

1) Brevity of exchange is not controlling in determining whether an interrogation has taken place

2) Includes words and actions of police they know are reasonably likely to elicit incriminating response from suspect

3) Focus on perceptions of suspect, not intent of police

4) Test one of "objective foreseeability"—i.e., would objective observer foresee incriminating response elicited? Also includes officer's knowledge of Def's susceptibility